

90-288

No. _____

Supreme Court, U.S.

FILED

AUG 15 1990

JOSEPH E. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18
and VICTOR C. OLIVADOTI,

Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND
HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK
STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND,
JAMES M. CARLTON, EVERETT L. CAMPBELL, JAMES A.
HOOD, JOHN PRYSHLAK, NICHOLAS ROBILOTTO, and
ERVIN WALKER,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ROBERT M. BAPTISTE
(Counsel of Record)
ROLAND P. WILDER, JR.
PATRICK J. SZYMANSKI
CHRISTY CONCANNON
BAPTISTE & WILDER, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 505
Washington, D.C. 20006
(202) 223-0723

MIMI C. SATTER
BAKER CLARK SATTER & DALY
608 State Tower Building
Syracuse, New York 13202
(315) 471-3027

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether Section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186 (c)(5), which provides that "employees and employers [be] equally represented in the administration" of joint union-management benefit funds, requires that employee and employer trustees remain accountable to their respective sponsoring group through the right to remove or reappoint the trustees at reasonable intervals.

2. Whether Section 302(c)(5) of the LMRA and Section 404(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a), which provide that trustees act "solely in the interest of participants and beneficiaries," require strict scrutiny of actions by trustees that alter the procedures governing their own removal and reappointment.

PARTIES IN THE COURT OF APPEALS

The parties before the Second Circuit Court of Appeals were New York State Teamsters Joint Council 18 and Victor C. Olivadoti (Petitioners in this Court); and New York State Teamsters Council Health and Hospital Fund, the Trustees of the New York State Teamsters Council Health & Hospital Fund, James M. Carlton, Everett L. Campbell, James A. Hood, John Pryshlak, Nicholas Robilotto and Ervin Walker (Respondents in this Court).

TABLE OF CONTENTS

| | Page |
|---|------|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE PETITION | 6 |
| CONCLUSION | 17 |
| APPENDIX A | 1a |
| APPENDIX B | 11a |
| APPENDIX C | 18a |
| APPENDIX D | 23a |
| APPENDIX E | 27a |

TABLE OF AUTHORITIES

| CASES: | Page |
|--|---------------|
| <i>Arroyo v. United States</i> , 359 U.S. 419 (1959) | 8 |
| <i>Associated Contractors v. Laborers Int'l Union</i> , 559 F.2d 222 (3d Cir. 1977) | <i>passim</i> |
| <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) | 5 |
| <i>Denver Metropolitan Ass'n v. Journeymen Plumb- ers</i> , 586 F.2d 1366 (10th Cir. 1978) | 8 |
| <i>Donovan v. Bierwirth</i> , 680 F.2d 263 (2d Cir.), <i>cert. denied</i> , 459 U.S. 1069 (1982) | 12 |
| <i>Dependahl v. Falstaff Brewing Corp.</i> , 491 F. Supp. 1188 (E.D. Mo. 1980), <i>aff'd in relevant part</i> , 653 F.2d 1208 (8th Cir.), <i>cert. denied</i> , 454 U.S. 968 (1981) | 12 |
| <i>Employing Plasterers' Ass'n v. Journeymen Plas- terers' Local 5</i> , 279 F.2d 92 (7th Cir. 1970) | 9 |
| <i>Firestone Tire & Rubber Co. v. Bruch</i> , 109 S.Ct. 948 (Feb. 21, 1989) | 12 |
| <i>Holcomb v. United Automotive Ass'n</i> , 852 F.2d 330 (8th Cir. 1988) | 8 |
| <i>Lamb v. Carey</i> , 498 F.2d 789 (D.C. Cir. 1974) | 9 |
| <i>Miles v. New York State Teamsters Conference Pension and Retirement Benefit Plan</i> , 698 F.2d 593 (2d Cir. 1983) | 6 |
| <i>Mobile, Alabama—Pensacola, Florida Building and Construction Trades Council v. Daugherty</i> , 684 F. Supp. 270 (S.D. Ala. 1988) | 8, 9 |
| <i>New York State Trucking Employers Ass'n, Inc. v. DePerno</i> , No. 86-CV-234 (N.D.N.Y.) | 14 |
| <i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 (1981) | 8, 10, 12 |
| <i>Quad City Builders Ass'n v. Tri City Bricklayers Union No. 7</i> , 431 F.2d 999 (8th Cir. 1970) | 9 |
| <i>Robilotto v. Scullen</i> , No. 83-CV-1291 (N.D.N.Y. June 20, 1985) | 4 |
| <i>Struble v. New Jersey Brewery Employees Welfare Trust</i> , 732 F.2d 325 (3d Cir. 1984) | 12 |
| <i>Teamsters Local No. 145 v. Kuba</i> , 631 F. Supp. 1063 (D. Conn. 1986) | 8, 9, 11, 13 |
| <i>Toensing v. Brown</i> , 374 F. Supp. 191 (N.D. Cal. 1974), <i>aff'd</i> , 528 F.2d 69 (9th Cir. 1975) | 9, 11 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|---------------|
| <i>United States v. Robilotto</i> , No. 81-CR-18 (N.D.N.Y. May 14, 1982) | 4 |
| <i>STATUTES:</i> | |
| 28 U.S.C. § 1254 (1) | 2 |
| Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 <i>et seq.</i> | <i>passim</i> |
| § 404, 29 U.S.C. § 1104 | <i>passim</i> |
| § 404 (a) (1), 29 U.S.C. § 1104 (a) (1) | <i>passim</i> |
| § 502 (a) (1) (B), 29 U.S.C. § 1132 (a) (1) (B) .. | 12 |
| Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-67, 171-87 | <i>passim</i> |
| § 302, 29 U.S.C. § 186 | <i>passim</i> |
| § 302 (c) (5), 29 U.S.C. § 186 (c) (5) | <i>passim</i> |
| National Labor Relations Act, as amended, 29 U.S.C. §§ 151-68 | 10 |
| § 8 (b) (1) (B), 29 U.S.C. § 158 (b) (1) (B) | 10 |
| <i>MISCELLANEOUS:</i> | |
| Goetz, <i>Developing Federal Law of Welfare and Pension Plans</i> , 55 Cornell L. Rev. 901 (1970) | 9 |
| H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 432-33, <i>reprinted in</i> 1989 U.S. Code Cong. & Admin. News 3035-36 | 16, 17 |
| Pension & Welfare Benefits Opinion Letter 85-41A, U.S. Dep't of Labor (Dec. 5, 1985) | 8, 13 |
| U.S. Department of Labor, Pension and Welfare Benefits Administration, <i>Trends in Pensions</i> (GPO 1989) | 16 |
| 14 (Table 1.4) | 16 |
| 53 (Table 4.1) | 16 |



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. —

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18
and VICTOR C. OLIVADOTI,
Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND
HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK
STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND,
JAMES M. CARLTON, EVERETT L. CAMPBELL, JAMES A.
HOOD, JOHN PRYSHLAK, NICHOLAS ROBILOTTO, and
ERVIN WALKER,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

New York State Teamsters Joint Council 18 and Victor C. Olivadoti petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 18, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-10a) is reported at 903 F.2d 919. The oral opinion of the district court (App., *infra*, 11a-14a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Section 302 of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. § 186, and of Section 404 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104, are set forth at App., *infra*, 27a-29a.

STATEMENT

1. The New York State Teamsters Council Health and Hospital Fund ("Fund") is a employee benefit trust established under Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and maintained in compliance with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The Fund was created in 1952 by the New York State Teamsters Council and various sponsoring employers. The Fund was established to accept contributions from employers party to collective bargaining agreements with the local unions affiliated with the New York State Teamsters Council and to provide health insurance and related benefits to employees represented by those local unions and working under those agreements. The Fund is a jointly administered trust with four employer and four employee trustees. App., *infra*, 3a; C.A. App. 158-64.¹

The New York State Teamsters Council, currently known as New York State Teamsters Joint Council 18, is an intermediate labor organization consisting of Teamster local unions in upstate New York (C.A. App. 114). The

¹ "C.A. App." refers to the joint appendix filed in the Court of Appeals.

officers of these local unions are the delegates to the Joint Council. The Joint Council executive board is elected by the delegates once every three years.

Until February 1988, the trust agreement provided that the employee trustees would be chosen "in accord with the rules and regulations" of the Joint Council, would each serve a four-year term, and would "automatically replace themselves . . . for a like term unless removed" by the Council (App., *infra*, 3a-4a). The trust agreement provided that the trustees otherwise could be removed from office only for "malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees" (App., *infra*, 21a; C.A. App. 147, 159).

Until February 1988, employee trustees were in fact periodically reappointed, removed or appointed by the Joint Council 18 executive board with the approval of the local union delegates to the Council (C.A. App. 115, 184-96).² Victor C. Olivadoti became Joint Council president in October 1986 and was appointed an employee trustee in September 1987 (C.A. App. 115).

Prior to a meeting of the Fund trustees scheduled for February 23-24, 1988, Trustee Olivadoti was informed that an amendment changing the method of removing and appointing trustees would be proposed for the purpose of protecting one of the other employee trustees, Nicholas Robilotto, from being removed as a trustee by the Joint Council (C.A. App. 116).³ On February 24, the ~~three~~^{two}

² Some local unions affiliated with two other Joint Councils—Joint Councils 17 and 46—have contracts with employers that provide for coverage under the Fund. These Joint Councils were not sponsors of the Fund and have never appointed or removed any of the employee trustees. C.A. App. 115, 184-196.

³ Trustee Robilotto was not an officer or employee of any local union affiliated with Joint Council 18. He had relinquished his right to any union office or position and, in particular, his position as principal executive officer of one of the local unions affiliated with Joint Council 18, in 1983 as the result of an agreement in which

employer and ~~three~~^{four} employee trustees in attendance voted five-to-one, Trustee Olivadoti dissenting, to amend the trust agreement to change the method of selecting and removing employee trustees (App., *infra*, 4a-5a; C.A. App. 115).⁴ The amendment provided that employee trustees would "automatically replace themselves at the end of their regular terms every four (4) years for a like term unless removed as required by law or by unanimous vote of the remaining existing employee trustees." App., *infra*, 4a-5a, 23a-24a.⁵ The amendment eliminated Joint Council 18's authority to remove and appoint employee trustees and, as a practical matter, allowed the then sitting trustees, including Robilotto, to retain their positions indefinitely and without the consent of the sponsoring labor organization.

2. Joint Council 18 and Trustee and fund participant Olivadoti brought suit against the Fund and the other trustees alleging that the February 1988 amendment violated Section 302(c)(5) of the LMRA, 29 U.S.C. § 186

he pled guilty to three counts of filing fraudulent tax returns (26 U.S.C. § 7206(1)). *United States v. Robilotto*, No. 81-CR-18 (N.D.N.Y. May 14, 1982); see *Robilotto v. Scullen*, No. 83-CV-1291 (N.D.N.Y. June 20, 1985), Slip Op. at 2.

⁴ A 1987 amendment to the trust agreement requires a quorum of two employer and two employee trustees and guarantees each group "the same number of votes as the other group" even when it has fewer trustees present (C.A. App. 167).

⁵ The February 1988 amendment further provided that employee trustees would cease "to be a trustee in the event they cease to be either (1) an elected local union officer of a participating local union, or (2) a representative of such participating local union officially designated by such local union" and that, in the event of a vacancy, employee trustees would be "nominated by any participating joint council" and selected by a majority vote of the existing employee trustees (App., *infra*, 24a-25a).

The amendment provided similar procedures for selecting and removing employer trustees, "with one significant difference," namely that employer trustees could be removed not only by a unanimous vote of the other employer trustees or "as required by law" but also by a two-thirds vote of the participating employers (App., *infra*, 5a, 24a).

(c) (5), which requires "employees and employers [be] equally represented in the administration" of joint union-management benefit funds, by eliminating the Joint Council's "right both to appoint and remove union trustees" and by allowing "the current union trustees to serve as long as they wished without answering to the Council for their administration of the trust" (C.A. App. 8-9). The complaint also alleged that the defendant trustees violated Section 404(a) (1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a) (1), which requires trustees to act for the "sole and exclusive benefit" of Fund participants, by adopting the amendment "so that one or more trustees could perpetuate their positions on the Board of Trustees" (C.A. App. 9).

Joint Council 18 and Trustee Olivadoti noticed discovery including the depositions of Robilotto and other trustees, but the district court stayed discovery pending decision on the defendants' motion for summary judgment. The district court granted that motion. In an oral opinion, the district court ruled that Section 302(c) (5) of the LMRA requires only that employers and employees "be represented by an equal number of trustees" and found "nothing on the face of the Trust Agreement, as amended, which could lead this court to conclude that it creates a structure where either the unions or the management could dominate the Board." App., *infra*, 13a. The district court ruled that the amendment did not violate Section 404(a) (1) of ERISA because it did not violate Section 302(c) (5) of the LMRA and because it did not create the possibility of future abuse (App., *infra*, 13a-14a).⁶

⁶ Joint Council 18 and Trustee Olivadoti objected that their claims could not be dismissed on summary judgment because material facts, including the motive of the trustees for changing the method of removing and selecting employee trustees, were disputed and discovery had been pretermitted. C.A. App. 84, 95-98. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (nonmoving party should not be "railroaded" through denial of adequate opportunity for discovery).

3. On appeal, the United States Court of Appeals for the Second Circuit affirmed. The court held that the equal representation requirement of Section 302(c)(5) of the LMRA "is aimed at balancing the interests of employers as a group with employees as a group" and "is not concerned with the allocation of power within either group." App., *infra*, 6a. The court found that neither the fact that Joint Council 18 had lost its authority to appoint and remove employee trustees nor the fact that this authority had been "disseminated among other joint councils and local unions" affected the required balance (App., *infra*, 6a-7a). To the contrary, the court found that this dispersion of authority "increases rather than decreases accountability of the employee trustees." App., *infra*, 7a.

With respect to plaintiffs' claim under ERISA Section 404(a)(1), the court held that the amendment "should not be disturbed absent a showing of bad faith or arbitrariness." App., *infra*, 9a, citing *Miles v. New York State Teamsters Conference Pension and Retirement Benefit Plan*, 698 F.2d 593 (2d Cir. 1983). The court of appeals affirmed the district court's dismissal of this claim because it found plaintiffs' "accusation" that "the trustees adopted the amendment to frustrate attempts to remove them" was "unsupported." App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), requires that "employees and employers [be] equally represented in the administration" of joint union-management benefit funds. This equal representation requirement was designed by Congress to impose a "quasi-adversarial" scheme of administration in which the differing views of employee and employer trustees "would provide safeguards against trust fund corruption." *Associated Contractors v. Laborers Int'l Union*, 559 F.2d 222, 228 (3d Cir. 1977). This scheme cannot operate successfully unless employee and employer

trustees are held accountable to the group whose interests they have been appointed to represent. The court below erred in ignoring this fundamental aspect of the equal representation requirement and in approving a trust amendment that eliminated the accountability of employee trustees to the sponsoring labor organization.

Moreover, both the important role of Section 302(c) (5)'s structural requirements in preventing the possible abuse or misuse of trust fund assets and the exacting fiduciary obligations imposed on trustees by Section 404 (a) (1) of ERISA require "strict scrutiny" of any action by trustees that alters the procedures that govern their own removal and appointment. Under this strict standard, the facts presented to the courts below established a prima facie violation and made summary judgment improper. The court below therefore erred when it applied the lesser "bad faith or arbitrariness" standard and affirmed summary judgment dismissing Petitioners' complaint.

These issues warrant review because, in these respects, the decision of the court below conflicts with the decision of the Third Circuit Court of Appeals in *Associated Contractors v. Laborers Int'l Union*, 559 F.2d 222 (1977), and because these issues are of fundamental importance in insuring the proper administration of thousands of jointly administered trusts and protecting the hundreds of billions of dollars of assets these trusts hold for the benefit of millions of working men and women throughout the country.⁷

⁷ Petitioners respectfully suggest that the Court request the Department of Labor to express its view concerning the issues presented by this petition. Such a request is appropriate given that the Department of Labor is responsible for the public enforcement of both of the statutes here at issue and, in particular, has issued an advisory opinion in which it stated that a "lifetime term of appointment" for a trustee would be "inconsistent with ERISA's fiduciary responsibility provisions," that a procedure that allowed "a plan

1. Section 302(c)(5) of the LMRA, 29 U.S.C. § 186 (c)(5), requires that “employees and employers [be] equally represented in the administration” of joint union-management benefit funds (App., *infra*, 27a-28a). The requirement of equal representation was designed to prevent misuse of the “vast amounts of money” controlled by these funds. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981). See *Denver Metropolitan Ass’n v. Journeymen Plumbers*, 586 F.2d 1366, 1374 (10th Cir. 1978); *Holcomb v. United Automotive Ass’n*, 852 F.2d 330 (8th Cir. 1988).⁸

sponsor” to “appoint a successor trustee only upon successfully bringing such charges as misfeasance or incapacity to perform the duties of the position” tends to “frustrate[]” the principles embodied in ERISA, and that “[l]imited terms, such as for a specified number of years, . . . generally would be consistent with ERISA.” Pension & Welfare Benefits Opinion Letter 85-41A, U.S. Dep’t of Labor (Dec. 5, 1985).

⁸ There is no merit to the suggestion made below by Respondents (Brief to the Court of Appeals, at 16) that the equal representation requirement prohibits only union abuse and not employer abuse of trust fund assets. The wording of Section 302(c)(5) explicitly refers to trust funds in which “employees and employers are *equally* represented in the administration of such fund[s]” (emphasis added). Although the impetus for enactment of Section 302 was the desire by Congress to prevent union abuses of trust fund assets (*Arroyo v. United States*, 359 U.S. 419, 425-26 (1959)), there is nothing in the legislative history to suggest that when Congress used the word “equally” it meant anything other than strict equality of representation. Although this Court has not squarely addressed this precise issue, the lower courts have uniformly recognized that Section 302(c)(5) applies to prevent both union and employer domination and abuse. See, e.g., *Holcomb v. United Automotive Ass’n*, 852 F.2d 330 (8th Cir. 1988) (union entitled to equal representation); *Denver Metropolitan Ass’n v. Journeymen Plumbers*, 586 F.2d 1366, 1374 (10th Cir. 1978) (court may require different method of appointment “if it appears that the unions (or employers) dominate the trustees, so that there is not truly equal representation of employers and employees”); *Teamsters Local 145 v. Kuba*, 631 F. Supp. 1063 (D. Conn. 1986); *Mobile Bldg. and Constr. Trades Council v. Daugherty*, 684 F. Supp. 270 (S.D. Ala. 1988).

The equal representation requirement operates to achieve this goal by imposing a "quasi-adversarial" system of administration in which employee and employer trustees, "[i]nsofar as it is consistent with their fiduciary obligations," are "expected to advance the interests" of their respective groups. *Associated Contractors v. Laborers Int'l Union*, 559 F.2d 222, 228 (3d Cir. 1977); see *Lamb v. Carey*, 498 F.2d 789, 793 (D.C. Cir. 1974); *Toensing v. Brown*, 374 F. Supp. 191, 195-96 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921-923 (1970). The efforts of trustees are not only "legitimate" but "essential" to the operation of Section 302(c)(5), for "Congress envisioned the conflict of views as a distilling process which would provide safeguards against trust fund corruption." *Associated Contractors v. Laborers Int'l Union*, 559 F.2d at 228.

Plainly, this system of "checks and balances" was "designed to be a prophylactic rule that would check abuses of trust before they could occur and possibly jeopardize the benefits of plan participants." *Teamsters Local 145 v. Kuba*, 631 F. Supp. 1063, 1070 (D. Conn. 1986); accord *Associated Contractors v. Laborers Int'l Union*, 559 F.2d at 227; *Employing Plasterers' Ass'n v. Journeymen Plasterers' Local 5*, 279 F.2d 92, 97 (7th Cir. 1970); *Quad City Builders Ass'n v. Tri City Bricklayers Local 7*, 431 F.2d 999, 1003 (8th Cir. 1970); *Mobile Bldg. and Constr. Trades Council v. Daugherty*, 684 F. Supp. 270, 281-82 (S.D. Ala. 1988).

The essential point here, and one on which the Court has not spoken, is that the equal representation clause of Section 302(c)(5) necessarily requires that employee and employer trustees remain accountable to the group whose interests they have been appointed to represent. Accountability is an intended and essential element of the statutory scheme that follows naturally and directly from

the wording of the statute and the character of the system of checks and balances envisioned by Congress.

The wording of the statute contemplates that employee and employer trustees will act to some degree as the "representatives" of their respective groups. The equal representation clause requires that "employees and employers are equally *represented* in the administration" of the fund, and the immediately following clause, which allows employee and employer trustees to select additional neutral trustees, explicitly identifies the trustees as the "*representatives* of the employers and the *representatives* of employees." App. *infra*, 27a, 29 U.S.C. § 186(c)(5) (emphasis added). Accountability is a necessary part of any concept of representation. Without accountability there is no guarantee that the representative will continue to reflect the interests of the represented.⁹

Accountability is equally essential to the proper operation of the system of checks and balances embodied in the equal representation requirement. As shown, this system operates on the fundamental premise that "consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer[s]"

⁹ We recognize that the Court held in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), that the employer trustees of a jointly administered fund are not "'representatives' of the employer 'for the purposes of collective bargaining or the adjustment of grievances' within the meaning of § 8(b)(1)(B)" of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). This holding neither answers nor forecloses the issue presented here, for we do not contend that trustees act either as bargaining representatives or as agents for their respective sponsoring groups. Rather, we contend, consistent with the statute, that, to the degree permitted by their fiduciary obligations, trustees are expected to reflect the often differing interests of their respective sponsoring groups in much the same way that an elected official represents the interests of his or her constituency. Neither this degree of representation nor the periodic accountability that its effective operation requires is precluded by the Court's decision in *Amax Coal*.

and employee trustees are expected to further the interests of the union[s].” *Associated Contractors v. Laborers Int’l Union*, 559 F.2d at 228. The absence of accountability undermines this premise and with it the entire system.

2. Both LMRA Section 302(c)(5) and the exacting fiduciary standards imposed by ERISA Section 404(a), 29 U.S.C. § 1104(a), require strict scrutiny of actions by trustees that alter the procedures governing their own removal and reappointment.

That Section 302(c)(5) requires such searching review follows from the critical importance of Section 302(c)(5)’s structural requirements. The purpose of these requirements is to prevent abuses before they occur, before participants and beneficiaries are injured, and before fund assets are lost. If these requirements are ignored or less than vigorously enforced, the door will be open to abuse and misuse. Participants and beneficiaries may be injured and assets lost or squandered before the wrong is discovered and remedied. *See, e.g., Teamsters Local 145 v. Kuba*, 631 F. Supp. at 1070; *Toensing v. Brown*, 374 F. Supp. at 195. It is to fulfill this critical purpose that, as the Third Circuit Court of Appeals held in *Associated Contractors v. Laborers Int’l Union*, 559 F.2d at 227:

Any amendment . . . which even slightly restructures the representation of employers and employees in the fund administration must be carefully scrutinized, not merely for technical compliance with the statutory standard but for meaningful adherence to the Congressional command.

Faithful adherence to the requirements of Section 302(c)(5) therefore demands that courts carefully scrutinize not only the formal procedures implemented by such amendments but also their practical effects to determine whether they undermine accountability and pose a “very

real possibility" of "abuse" or "domination" by one group or the other. *Id.*

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), requires trustees to act "solely in the interest of participants and beneficiaries" (App., *infra*, 29a). *NLRB v. Amax Coal Co.*, 453 U.S. at 332; *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982). This strict fiduciary standard applies when trustees "have sacrificed valid participant interests to advance the interests of non-beneficiaries." *Struble v. New Jersey Brewery Employees Welfare Trust*, 732 F.2d 325, 333 (3d Cir. 1984). This category includes "dual loyalty" cases in which the trustees are alleged to have acted to benefit the employer, the union or themselves. *E.g.*, *Struble v. New Jersey Brewery Employees Welfare Trust*, 732 F.2d at 333 (giving surplus assets back to contributing employers); *Donovan v. Bierwirth*, 680 F.2d at 272 ("high standard of duty" where position as trustee conflicted with position as corporate officer during takeover bid); *Kuba*, 631 F. Supp. at 1071 (amendment providing that trustees could be removed only for cause); *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188, 1197 (E.D. Mo. 1980), *aff'd in relevant part*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (amendment to severance pay plan restricting eligibility on eve of mass reduction in the employer's workforce). A lesser standard applies where the alleged breach involves a decision to modify or deny benefits. *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (Feb. 21, 1989) ("de novo" or "abuse of discretion" depending on the terms of the plan); *see Struble v. New Jersey Brewery Employees Welfare Trust*, 732 F.2d at 333 (citing cases).¹⁰

¹⁰ *Firestone* involved a claim for benefits under Section 502 (a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The Court there noted that it "express[ed] no view as to the appropriate standard of review under other remedial provisions of ERISA." 109 S.Ct. at 953.

Petitioners alleged that the defendant trustees adopted the February 1988 amendment to protect one or more of them from possible removal. It is plain that this case falls into the first category and not the second and that a strict standard of review therefore must be applied.

3. Strict review of the February 1988 amendment shows that it violated the structural requirements of Section 302(c)(5) by eliminating any meaningful accountability of the employee trustees to the employees they were appointed to represent and that its adoption established a prima facie breach of the defendant trustees' fiduciary obligations.

Thus, prior to the amendment, the right of employee trustees to continue to sit as trustees was subject to periodic review by the sponsoring labor organization. This review was accomplished through the Joint Council executive board and the action of the local union delegates to the Joint Council. Under the amendment, sitting employee trustees could only be removed "by unanimous vote of the remaining existing employee trustees," "as required by law," or by action of their local union (App., *infra*, 4a-5a, 23a-25a). Removal "as required by law" does not serve the prophylactic purpose of the structural requirements of Section 302(c)(5) because it occurs after the breach has already been committed.¹¹ Removal by action of the remaining employee trustees does nothing to insure that a trustee remains accountable to employees, to the sponsoring labor organization or to the participating unions. Removal by action of the trustee's own local union, whether by loss of office or by loss of designation,

¹¹ The Department of Labor has stated its view that a procedure that allows removal of a trustee "only upon successfully bringing such charges as misfeasance or incapacity to perform the duties of the position" "frustrates" the principles embodied in ERISA. Pension & Welfare Benefits Opinion Letter 85-41A, U.S. Dep't of Labor (Dec. 5, 1985). See *Teamsters Local 145 v. Kuba*, 631 F. Supp. 1063, 1071 (D. Conn. 1986) (such a procedure violates LMRA Section 302(c)(5)).

makes the trustee accountable to but one small segment of the employee group he has been appointed to represent. As practical matter, the February 1988 amendment eliminated any meaningful accountability.

That the practical effect of the amendment was to eliminate meaningful accountability of the sitting trustees to the employee group they were appointed to represent is, by itself, sufficient to show that the amendment and the action of the defendant trustees in adopting it violated their fiduciary obligations. The additional facts that the amendment had not previously been discussed, that Trustee Olivadoti was informed before the February 1988 meeting that the purpose of the amendment was to prevent removal of Trustee Robilotto, that the amendment in fact had this effect, and that there was no other persuasive reason for changing the means of removing and appointing employee trustees further strengthened Petitioner's claim that adoption of the amendment violated both LMRA Section 302(c)(5) and ERISA Section 404(a)(1).¹²

¹² There is no support for the assertion made below by Respondents (Brief to the Court of Appeals, at 8-9) that the purpose of amending the method of selecting employee trustees was to "conform the language of the Trust Agreement to the . . . settlement" in *New York State Trucking Employers Ass'n, Inc. v. DePerno*, No. 86-CV-234 (N.D.N.Y.). The substance of the settlement reached in that case on February 25, 1987, was quoted by Respondents in their brief below (at 8):

The Union Trustees agree that they will not participate or become involved in any way in the process of selecting, seating or removing the Employer Trustees . . . and the Employer Trustees agree that they will not participate or become involved in any way in the process of selecting, seating or removing Union Trustees

This settlement occurred a full year before the February 1988 amendment was proposed and provides not the faintest excuse for eliminating the role of Joint Council 18 in the removal or selection of employee trustees.

Under the appropriate standard of review, and with a proper appreciation for the fundamental importance of the principle of accountability, Petitioners demonstrated the prima facie validity of their claims. Summary judgment should have been denied, and having been granted, should have been reversed. The contrary result in the court below resulted from its failure to recognize the fundamental importance of accountability and its failure to strictly scrutinize the February 1988 amendment to determine whether it violated this important principle.

4. The decision below conflicts with the decision of the Third Circuit Court of Appeals in *Associated Contractors v. Laborers Int'l Union*, 559 F.2d 222 (1977). As noted above, *Laborers* requires strict scrutiny of any amendment that "even slightly restructures the representation of employers and employees in the fund administration" *Id.* 227. The Third Circuit Court of Appeals' decision demonstrates that this standard of review requires not just attention to the numerical equality of representation but also a searching inquiry into the practical effect of changing the allocation of power within either the employer or employee group. *Id.* 226-29. In particular, the Third Circuit Court of Appeals held that the amendment before it—which eliminated the sponsoring employer association's right to select all the employer trustees and provided that two trustees would be selected by the sponsoring employer association and two by a newly organized rival association—violated the equal representation requirement because, under the circumstances, it created a "potential for union abuse" by making it possible for a united group of union trustees to dominate the trust through an "alliance" with one or the other of the employer associations. *Id.* at 228-29.

The decision of the court below conflicts with *Laborers* both in the standard applied and in its application. Contrary to *Laborers*, the court below ruled that Section 302(c) (5) did not require it to examine "the allocation

of power within either [the employee or the employer] group" (App., *infra*, 6a). Contrary to *Laborers*, the court below refused to apply a standard of strict scrutiny and instead applied the lesser "bad faith or arbitrariness" standard (App., *infra*, 9a). Contrary to *Laborers*, the court below confined itself to examining the formal procedures implemented by the disputed amendment and failed to examine the practical effect of those procedures on the loyalties of the sitting trustees. And although *Laborers* concluded that a split in appointive power between employer associations created the potential for union abuse, the court below rejected on summary judgment the notion that dividing removal power among numerous local unions could lead to domination or abuse through an alliance between a united group of employer trustees and one or more employee trustees. Review is warranted to resolve the conflict on these issues between the Third Circuit Court of Appeals and the court below.

5. The issues presented in this petition are of national concern. The Department of Labor oversees approximately 5.5 million employee benefits plans with \$2 trillion in assets. The Department is currently able to investigate less than 3,000 plans each year. Fiduciary violations are found in one-fourth of the plans reviewed. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 432-33, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3035-36.¹³ In amending ERISA to increase the civil penalty for certain fiduciary violations from 5 to 20 percent, Congress stated (*id.*):

¹³ Similar statistics limited to jointly-administered funds are not readily available. Recent figures show, however, that more than 3,000 collectively bargained private pension plans were in existence in 1985, that these plans had almost 6.5 million participants, and that, as of 1987, collectively bargained pension plans held more than \$160 billion in assets. U.S. Department of Labor, Pension and Welfare Benefits Administration, *Trends in Pensions* 14 (Table 1.4), 53 (Table 4.1) (GPO 1989). On the average, each of these plans has

[T]he need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. The conferees expect that the executive agencies and the courts will use their substantial authority to achieve these goals and to safeguard the rights of plan participants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BAPTISTE
(Counsel of Record)
ROLAND P. WILDER, JR.
PATRICK J. SZYMANSKI
CHRISTY CONCANNON
BAPTISTE & WILDER, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 505
Washington, D.C. 20006
(202) 223-0723

MIMI C. SATTER
BAKER CLARK SATTER & DALY
608 State Tower Building
Syracuse, New York 13202
(315) 471-3027

August 1990

Attorneys for Petitioners

more than 2000 participants and hold \$50 million in assets; these plans are, of course, governed by the same statutory provisions that are at issue here.

APPENDICES

APPENDICES

APPENDIX TABLE OF CONTENTS

| | Page |
|--|------|
| A. Court of Appeals' Written Decision Affirming District Court's Order (filed May 18, 1990) | 1a |
| B. Transcript of District Court's Bench Decision and Order Granting Defendant's Motion for Summary Judgment (filed May 31, 1989). Judgment filed June 28, 1989 | 11a |
| C. Pertinent Sections of Trust Instrument of New York State Teamsters Council Health and Hospital Fund | 18a |
| D. Amendment to Trust Instrument of New York State Teamsters Council Health & Hospital Fund dated February 24, 1988 | 23a |
| E. Statutory Appendix | |
| 1. Labor Management Relations Act of 1947, Section 302 (a), (c) (5) (B) | 27a |
| 2. Employee Retirement Income Security Act of 1974, Section 404 (a) (1) | 29a |



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 535, 572—August Term 1989

Argued: December 18, 1989 Decided: May 18, 1990

Docket Nos. 89-7674, 89-7708

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
JOINT COUNCIL 18 and VICTOR C. OLIVADOTI,
Plaintiffs-Appellants-
Cross-Appellees,

—against—

THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH
AND HOSPITAL FUND, THE TRUSTEES OF THE NEW
YORK STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL
FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL,
JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBI-
LOTTO, ERVIN WALKER,

Defendants-Appellees-
Cross-Appellants.

Before:

OAKES, *Chief Judge*,
PRATT, *Circuit Judge*, and
Leonard B. Sand, *District Judge* for the
Southern District of New York, sitting by designation.

Appeal by plaintiffs from summary judgment of United States District Court for Northern District of New York, Neal P. McCurn, *Chief Judge*, holding that amendment to trust agreement governing employee benefit fund violates neither Labor Management Relations Act nor Employee Retirement Income Security Act. Cross-appeal by defendants from denial of attorneys fees and costs.

Appeal affirmed; cross-appeal reversed and remanded.

ROBERT M. BAPTISTE, Washington, DC (Baptiste & Wilder, P.C., Roland P. Wilder, Jr., Christy Concannon, Baker, Clark & Satter, Syracuse, NY, Mimi C. Satter, of Counsel), *for Plaintiffs-Appellants-Cross-Appellees*.

JAMES J. KELLY, Washington, DC (Morgan, Lewis & Bockius, Thomas K. Wotring, Kevin L. Wright, Blitman & King, Syracuse, NY, Bernard T. King, Jules L. Smith, of Counsel), *for Defendants-Appellees-Cross-Appellants*.

PRATT, *Circuit Judge*:

On these cross-appeals, we are asked to decide two issues. The first is whether a redistribution of the power to appoint and remove the employee trustees of an employee benefit fund violates either the Labor Management Relations Act ("LMRA") or the Employee Retirement Income Security Act ("ERISA"). Because we conclude that the challenged amendment has no impact on the distribution of power between employer trustees and employee trustees, we hold that it violates neither LMRA nor ERISA. The second issue is whether the defendants are entitled to attorneys' fees. Because the district court did not state any reasons for its denial of this request, we remand on this issue.

Joint Council 18 of the International Brotherhood of Teamsters ("Joint Council 18") and Victor C. Olivadoti, who is president of Joint Council 18 and a trustee of the New York State Teamsters Council Health and Hospital Fund (the "fund"), appeal from a summary judgment of the United States District Court for Northern District of New York, Neal P. McCurn, *Chief Judge*, dismissing their claim that an amendment to the fund trust agreement, implemented on February 24, 1988, violated LMRA and ERISA. The fund and its remaining trustees, the defendants in the district court, cross-appeal from the district court's refusal to award them attorneys' fees and costs. For the reasons that follow, we affirm the dismissal of plaintiffs' claims, but remand the action to the district court for appropriate findings with regard to its denial of attorneys' fees and costs.

BACKGROUND

The fund is a welfare benefit trust fund established pursuant to § 302(c)(5) of LMRA, 29 U.S.C. § 186(c)(5) (1978), and maintained in compliance with ERISA, 29 U.S.C. § 1104(a)(1)(B) (1985). It was created in 1952 to provide health benefits to employees through contributions made by participating employers in accordance with collective bargaining agreements between the employers and local unions. The original trust agreement was executed by employer trustees appointed by contributing employers and employee trustees appointed by the New York State Teamsters Council, later redesignated as Joint Council 18. At that time Joint Council 18 was comprised of all the local teamsters unions in New York State located outside of New York City. The trust agreement has been amended from time to time.

From 1976 to 1988, the fund was administered by a board of trustees consisting of four employee representatives and four employer representatives. Under the trust agreement, employee trustees were chosen in accordance with the rules and regulations of Joint Coun-

cil 18 and were automatically replaced by Joint Council 18 at the end of their regular four-year terms "unless removed by [Joint Council 18]." Employer trustees, by contrast, were selected and subject to removal by representatives of participating employers. These representatives were chosen by "[t]he Board of Trustees as a whole".

In 1986 the employer trustees and the New York State Trucking Employers Association sued the employee trustees in federal district court, alleging that the procedures used to select the employer trustees for the fund improperly allowed the employee trustees to participate in the selection. *New York State Trucking Employers Ass'n, Inc. v. DePerno*, No. 86-CIV-234 (N.D.N.Y.). That action was settled in February of 1987, under an agreement that provided in part that the employee trustees would "not participate or become involved in any way in the process of selecting, seating or removing the Employer Trustees to the [fund]". The settlement also provided that the employer trustees would refrain from any involvement in the selection or removal of employee trustees.

On February 24, 1988, the board of trustees adopted, by a five to one vote, an amendment to the trust agreement that changed the selection and removal process for trustees. Of particular relevance to this lawsuit, the amendment eliminated the unilateral authority of Joint Council 18 to designate employee trustees. Instead, the amendment distributes that power among the local unions participating in the fund and the three joint councils that represent these local unions. Specifically, whenever a vacancy exists, the three joint councils separately nominate prospective replacements, who must be either elected officers or designated representatives of a participating local union. The existing employee trustees then select, by majority vote, a new trustee from the list of those nominated by the councils. No local union may have more than one trustee on the board at any time.

The procedure for removing employee trustees was also significantly altered. Under the amended agreement, employee trustees are automatically replaced at the end of their regular four-year terms, "unless removed as required by law or by unanimous vote of the remaining existing employee Trustees." An employee trustee must also be replaced if he ceases to be an elected officer or designated representative of one of the participating locals.

Procedures for selecting and removing employer trustees are similar to those for employee trustees, with one significant difference: employer trustees can be removed "by a vote of two-thirds or more of the employers who contribute to the Fund". Employee trustees, by contrast, are not subject to removal by a two-thirds, or any other, vote of the local unions.

Joint Council 18 and Olivadoti, the one trustee who voted against the amendment, filed the present action against the fund and the remaining trustees on January 17, 1989. They claimed that the amendment violated both the equal representation and "rational nexus" requirements of LMRA, and constituted a breach of the trustees' fiduciary duties under ERISA. Defendants counterclaimed to recover attorneys' fees and costs. On May 31, 1989, the district court granted summary judgment in favor of defendants on the LMRA and ERISA claims, but denied defendants' request for attorneys' fees and costs. Joint Council 18 and Olivadoti appeal the dismissal of their LMRA and ERISA claims; defendants appeal the denial of fees and costs.

DISCUSSION

A. *LMRA Claims.*

Joint Council 18 and Olivadoti contend that the new procedure for appointing and removing employee trustees upsets the balance of power in the administration of

the fund and therefore violates the equal representation requirement of § 302 of LMRA, 29 U.S.C. § 186(c)(5). They also argue that the amendment does not further the purposes of § 302: they claim that by stripping Joint Council 18 of its accustomed power to designate employee trustees, the amendment makes the removal of these trustees more difficult, and this, they claim, creates the potential for abuse.

Section 302(c)(5) of LMRA exempts from its criminal prohibitions employer contributions to employee benefit funds that satisfy certain structural requirements. One of these requirements is that employees and employers must be "equally represented" in the administration of the fund. This equal representation requirement provides an important safeguard against trust fund corruption by "prevent[ing] any misuse of those funds by union officers who would otherwise have sole control over vast amounts of money contributed by the employer." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981).

Section 302 requires that employers and employees be equally represented on a fund's board of trustees. The statute is aimed at balancing the interests of employers as a group with employees as a group; it is not concerned with the allocation of power within either group. The section "only requires equality between the trustees representing the unions and those representing the employer, and not parity between the representatives of each union." *Culinary & Service Employees Union, AFL-CIO Local 555 v. Hawaii Employee Benefit Administration, Inc.*, 688 F.2d 1228, 1231-32 (9th Cir. 1982). For this reason, the section is not relevant to disputes among union factions.

Under the challenged amendment, Joint Council 18 has lost its dominant power over employee trustees. This power has now been disseminated among other joint councils and local unions. But the amendment did not

affect the balance of power between employers and employees; they are still equal as required by the statute. While Joint Council 18's historical control of the selection and removal process has been eroded by the amendment, this shift in power toward other councils and the local unions increases rather than decreases accountability of the employee trustees, for there are ample opportunities under the amendment to remove employee trustees. Employee trustees can be removed "as required by law" or by "unanimous vote of the remaining existing employee Trustees" and a trustee must be removed if he ceases to be either "an elected local union officer of a participating local union, or a representative of such participating local union officially designated by such local union."

Seeking to support their argument that the amendment violates the "equally represented" standard of § 302, Joint Council 18 and Olivadoti point to two district court cases: *Mobile, Alabama-Pensacola, Florida Building and Construction Trades Council v. Daugherty*, 684 F. Supp. 270 (S.D. Ala. 1988), and *Teamsters Local No. 145 v. Kuba*, 631 F. Supp. 1063 (D. Conn. 1986). However, in both these cases, where courts rejected amendments to provisions for appointment and removal of trustees, employee trustees had adopted provisions designed to prevent their own removal. The amendment that Joint Council 18 and Olivadoti contest has the opposite effect—it makes easier the removal of employee trustees and is therefore consistent with the objectives of § 302.

Joint Council 18 and Olivadoti also claim that the motive of the defendants in adopting the amendment was to permit the incumbent trustees to retain their positions and that the amendment therefore has no rational nexus to the requirement of § 302 that a fund be maintained "for the sole and exclusive benefit of the employees". As already noted, however, the amendment tends

to further the interests of LMRA by dispersing the appointing and removing power more widely among the employees. See *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (In passing LMRA, Congress was concerned about "the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."). Because the amendment properly furthers this important interest, we see no reason to probe further into the motives of the trustees in adopting it.

B. *ERISA Claim.*

Joint Council 18 and Olivadoti base their ERISA argument on the same unsupported accusation they advance in the context of their LMRA argument—that the trustees adopted the amendment to frustrate attempts to remove them. ERISA requires a trustee to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aim". 29 U.S.C. § 1104(a)(1)(B). Joint Council 18 and Olivadoti assert that the trustees' adoption of an amendment that made their removal more difficult was imprudent and a violation of their fiduciary duty. As we have seen, however, the amendment tends to reduce, not increase, the opportunities of employee trustees to entrench themselves. In addition, the minutes of the February 24th meeting clearly indicate that the amendment was adopted, at least in part, as a response to the lawsuit that had challenged the process for selecting trustees, a fact that suggests that the amendment was not adopted cavalierly, unthinkingly, or without regard for its legal consequences. For these reasons, the amendment does not violate the trustees' fiduciary duty under ERISA.

As we stated in *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir. 1983), "lawful, discretionary acts of a pension committee should not be disturbed, absent a showing of bad faith or arbitrariness." *Id.*, at 599 (Citations omitted). Plaintiffs here have failed to meet their burden of showing that the trustees acted illegally, in bad faith or arbitrarily. LMRA and ERISA provisions cannot be used as weapons in battles between union factions. The challenged amendment affects only the distribution of power among the unions and the unions' joint councils, and it does not operate to entrench the employee trustees. Since it was adopted with proper prudence and diligence and to achieve a legitimate purpose, the amendment does not violate the requirements of either LMRA or ERISA.

C. Attorneys' Fees and Costs.

Having prevailed on the ERISA claim, the defendants assert that they are entitled to attorneys' fees under § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1). The defendants claim that the litigation was unjustified and so Joint Council 18 should bear its cost. Ordinarily, district courts apply a five-factor test when determining whether attorneys' fees are appropriate. *Chambliss v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987). While the awarding of attorneys' fees "is discretionary, not mandatory", *Fase v. Seafarers Welfare and Pension Fund*, 589 F.2d 112, 116 (2d Cir. 1978), whichever way it exercises its discretion, a district court should make specific findings regarding the matter. *Cf. Klein v. Shields & Co.*, 470 F.2d 1344, 1348 (2d Cir. 1972) (holding that in a case involving attorneys' fees under Section 11(e) of the Securities Act of 1933, the district court erred when it failed to articulate findings of fact and conclusions of law with respect to attorneys' fees).

Because the district judge failed to articulate any reason for his decision to deny attorneys' fees, we remand with a direction to make appropriate findings on the issue. We recognize the broad discretion a district court has in making this ultimate determination, and we express no opinion on the merits of the question.

CONCLUSION

The district court's dismissal of Joint Council 18 and Olivadoti's claims is affirmed. The cross-appeal is remanded to the district court to make appropriate findings on the attorneys' fee issue.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Plaintiffs,

vs

THE NYS TEAMSTERS COUNCIL HEALTH
& HOSPITAL FUND, *et al.*,
Defendants.

Excerpt from proceedings held on May 31, 1989 in
Federal District Court in the Northern District of New
York before the Honorable NEIL P. McCURN.

APPEARANCES

THE LAW OFFICES OF ANTONIO FAGA
Attorneys for the Plaintiffs

By: ROBERT M. BAPTISTE, ESQ.
MIMI C. SATTER, ESQ.

BLITMAN & KING

By: BERNARD T. KING, ESQ.
JAMES J. KELLY, ESQ.
JULES L. SMITH, ESQ.

* * * *

[2] (The court was called to order at 4:37 p.m.)

THE COURT: All right. The Court has reviewed the papers in support of an opposition to the motions for a judgment on the pleadings or in the alternative for summary judgment in this matter and has listened to the arguments of counsel and has reviewed the applicable law. The following constitutes the Court's decision therein. Plaintiffs bring this action seeking declaratory and injunctive relief on the grounds that recent amendments to the New State Teamsters Council Health and Hospital Funds Trust Agreement violate: One, the equal representation requirements for trust fund administration under Section 302(c)(5) of the LMRA, 29 U.S.C. Section 186(c)(5). Two, the trustees fiduciary obligations under the Employee Retirement Income Security Act Section 404(a)(1)(B), 29 U.S.C. Section 1104(a)(1)(B).

As thoroughly detailed in the litigation papers, the challenged amendments operated to change the process by which the Trustees of the Defendant Trust Fund are selected and are subject to removal. The plaintiffs assert [3] that these changes constitute a violation of the above-named provisions of ERISA and LMRA.

Today this court addresses the defendant's motion for judgment on the pleadings or in the alternative for summary judgment. Both parties have treated this motion as one for summary judgment, and the Court will address defendant's motion in the same manner. All facts alleged by the plaintiffs have been taken as true. This court finds, however, that there are no facts material to the resolution of this dispute which are actually in dispute. LMRA Section 302(c)(5).

The purpose of Section 302(c)(5) is to assure that trust funds of the sort at issue in this action—strike that, in this action. Of the sort at issue in this motion are governed by a Board which is not subject to the domination of either labor or management. The provi-

sion, in essence, simply requires that the employers and employees be represented by an equal number of trustees. The provision was not, emphasized, created as a mechanism to resolve disputes among competing union groups for more active participation in the selection of trust fund trustees. See *Culinary & Service Employees [4] Union v. Hawaii Employees Benefits Fund*, 688 F.2d 1228, 1231-32. There is nothing on the face of the Trust Agreement, as amended, which could lead this court to conclude that it creates a structure where either the unions or the management could dominate the Board. Plaintiffs' main assertion that the amendments unlawfully strip Joint Council 18 of the power to remove a trustee lacks merit. There is no 302(c)(5) violation simply by virtue of the fact that one faction of the Teamsters Union has had its power removed. Section 302(c)(5) concerns whether there is an imbalance of power between labor and management in the selection of trustees, not, emphasized, to the appointment powers of the various union factions. Moreover, a reading of the amendments shows that there is ample opportunity for the employee trustees to be removed from their position. This included: One, a unanimous vote of the other employee trustees on the Board; two, removal as permitted under law; and three, removal if the trustee no longer is an officer or a duly designated representative of one of the 18 participating local teamsters unions.

ERISA Section 404(a)(1)(B). [5] This section of ERISA deals with the Fund Trustee's fiduciary obligation. Plaintiffs' claim that by enacting the amendments to the Trust Agreement, the members of the Board breached their fiduciary obligations by: One, self-dealing through an enactment which made themselves permanent members of the Board, an act illegal under Section 302(c)(5) of the LMRA; two, by acting without advice of counsel; and three, by setting up a structure where future abuse was inevitable.

This court has already found that the amendment to the Trustee Fund Agreement was not illegal under Section 302(c)(5). Further, even if the Court accepts the view of the plaintiffs that the Board acted without the advice of counsel, such an action without the advice of counsel is not necessarily a breach of a fiduciary obligation. Boards may act without counsel and still act as a fiduciary. Finally, the potential for abuse exists in any situation. This court, however, does not find that the structure of the Board of Trustees sets up a potential for abuse which would not be there under any other structure. The many ERISA enforcement provisions [6] and disclosure requirements serve the purpose of keeping trustees within ERISA's dictates. Accordingly, defendant is entitled to summary judgment as a matter of law and will be so ordered. I have signed an order to that effect. I do not grant costs or reasonable attorneys' fees. Court's in recess.

THE CLERK: Court's adjourned.

(The court adjourned at 4:50 p.m.)

* * * *

[7]

CERTIFICATE

I, SCOTT D. BOND, do certify that as a Notary Public in the State of New York, I attended and reported the above-entitled proceedings; that I have compared the foregoing with my original minutes taken therein, and that it is a true and correct transcript thereof.

/s/ Scott D. Bond
SCOTT D. BOND
Notary Public in and for
the State of New York.

My Commission Expires:

April 29, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 89-CV-048 (McCurn)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
JOINT COUNCIL 18 and VICTOR C. OLIVADOTI,
Plaintiffs,

v.

THE NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND, *et al.*,
Defendants.

PROPOSED ORDER

Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment having come before this Court and having been duly and thoroughly considered, it is hereby

ORDERED that Defendants' Motion ~~for Judgment on the Pleadings or in the Alternative~~ for Summary Judgment be and the same hereby is GRANTED, that this case be and hereby is DISMISSED, ~~and that the Defendants be granted their costs and reasonable attorneys fees for defending this action.~~

Entered: May 31, 1989

/s/ Neil G. McCurn
United States District
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case Number: 89-CV-0048

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
JOINT COUNCIL 18, *et al.*,

v.

THE NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants motion for SUMMARY JUDGMENT is GRANTED, and this case is DISMISSED.

Date: June 28, 1989

J. R. SCULLY
Clerk

/s/ William T. Kaminska
WILLIAM T. KAMINSKA
(By) *Deputy Clerk*

APPENDIX C

TRUST AGREEMENT

NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND

Preamble

WHEREAS, a trust agreement was made and entered into on the 9th day of June 1952 by and between the New York State Teamsters Council, a voluntary unincorporated association, hereinafter referred to as the "Council" and various Employers in the State of New York who now are, then were, or will hereinafter become parties to collective bargaining agreements with the said Council or participating local Unions and who then had, now have, or will hereinafter agree to be bound by this Trust Agreement, hereinafter called "Employers", and

WHEREAS, the New York State Teamsters Council Fund was established pursuant to such original Trust Agreement of June 9th, 1952 and has continued in operation from that time to the present; and,

WHEREAS, it appears advantageous to codify all previous changes and Amendments into one Instrument as amended; and

WHEREAS, the undersigned constitute the signatories to such original Trust Agreement and its Amendments from time to time, and all the remaining Trustees or their successors under the terms of such Trust Agreement, it is agreed in consideration of the premises and of the mutual promises and covenants made by each of the parties in the original agreement and hereto each to the other, as follows:

ARTICLE I

Organization

Section 1. There is hereby created and continued in existence the "NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND".

Section 2. The purposes of said trust fund shall be to promote, develop and administer a program which shall provide for the payment under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion, of welfare benefits for the employees of contributing employers under the terms of a collective bargaining agreement or agreements between such contributing employers and the New York State Teamsters Council and/or local unions affiliated or participating with the said New York State Teamsters Council, including death benefits, health and accident coverage, hospitalization, surgical benefits and proper medical and dental care. Any part or all of the above welfare benefits, with the exception of death benefits, may be extended to the dependents of such employees, under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion. Any local union may be considered as a contributing employer for its employees, and officers and business agents. Also considered as employers for their employees shall be the New York State Teamsters Council Health and Hospital Fund and the New York State Teamsters Conference Pension and Retirement Fund.

Section 3. The said trust fund shall be administered by a Board of Trustees, hereinafter designated as the "Trustees". There shall be equal representation of employees and employers in the administration of such Trust Fund. The trustees hereunder shall be eight (8) in number unless and until a different number shall be fixed by the Trustees as hereinafter provided, and thereafter shall be such number as shall be fixed from time to time by the Trustees; and the Trustees herein named shall continue to constitute the original Trustees thereunder.

Section 4. That, notwithstanding the said name and designation of "New York State Teamsters Council

Health and Hospital Fund" title to the entire Trust Estate or Fund and the absolute control thereof shall, at all times, be vested in the Trustees; and all obligations incurred by, or in behalf of, the Trustees, shall be obligations of the trustees only, and not of the members of the Union or Unions nor of the International Union to which said Union or Unions is affiliated nor of the New York State Teamsters Council as such, but enforceable only against the Trustees, and then only to the extent of the Trust Estate in their hands and possession and never against them or any of them in their individual capacity or capacities; nor shall such obligations be considered obligations of the Employers either collectively or individually.

Section 5. The original trustees under this Amended Trust Agreement shall be Rocco F. DePerno, Fred Maggio, Nicholas Robilotto, and Donald Wells, who are representatives of and chosen by the New York State Teamsters Council and Thomas R. Blando, Raymond Ryan, Gordon R. Tooley and Henry J. Tuffley, who are representatives of and chosen by the contributing Employers herein.

Section 6. The eight (8) Trustees names herein and who are at the present time holding office as such Trustees for four year terms respectively, are the following:

Donald Wells and William H. Mosley, Sr. to June 30th, 1977;

Rocco F. DePerno and Thomas R. Blando to June 30th, 1980;

Paul Gambaoroto and David Quidort to June 30th, 1979; and

Josiah M. Wills and Nicholas Robilotto to June 30th, 1978

and they shall continue to hold office as Trustees to the end of such term. The term of office of each successor trustee shall be four (4) years. Successor trustees representing the employees shall be chosen in accordance with the rules and regulations of the New York State Teamsters Council and shall automatically replace themselves at the end of their regular terms every four (4) years for a like term unless removed by the said New York State Teamsters Council. The Board of Trustees as a whole shall determine from time to time what employer group or groups shall elect successor employer trustees or fill vacancies in employer trustees, whether caused by death or otherwise. Such group or groups must, however, consist only of contributing employers to the Trust Fund, and no employer who is not a contributor to the said Trust Fund may vote for such employer trustees. The employer trustees shall automatically replace themselves at the end of their regular term every four (4) years unless removed by the employer group or groups designated by the Board of Trustees as provided herein.

Trustees can only be removed from office for malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees, and the Board as a whole is the sole judge of the qualifications of each Trustee. Title to all Trust property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision, without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

Section 7. The Trustees established under this Trust Indenture shall serve as the named fiduciaries as required by the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"). The Trustees shall have the authority to manage and control the administration and operation of the Fund and Plan.

Section 8. The principal office of the New York State Teamsters Council Health and Hospital Fund shall be located at such places as the Trustees shall designate from time to time.

* * * *

Art. II.

Section 4. That in order to constitute a quorum for the transaction of any business, there must be present three (3) Trustees representing the contributing employers and three (3) Trustees representing the New York State Teamsters Council at any meeting or adjourned meeting.

Section 5. When a quorum is present as above defined, a unanimous votes of the remaining Trustees shall be necessary for the removal of a Trustee as provided in Article I, Section 6 of this Trust Agreement. On all other questions, no proposition, resolution or motion shall be considered carried unless an affirmative vote is cast by two-thirds of the Trustees present at such meeting. In the event that two-thirds consist of a whole number and a fraction, then a two-thirds vote shall be deemed to consist of the next highest whole number.

* * * *

APPENDIX D

AMENDMENT TO TRUST AGREEMENT OF THE
NEW YORK STATE TEAMSTERS COUNCIL
HEALTH & HOSPITAL FUND

Agreed to this 24th day of February, 1988, by and between the Trustees of the New York State Teamsters Council Health and Hospital Fund (the "Trustees"). The provisions hereinafter stated are formally adopted as amending the existing Trust Agreement by a two-thirds vote of the Trustees pursuant to Article IV, Section 1 of the Trust Agreement and paragraph 3 of the October 20, 1987, amendment of the Trust Agreement, and they shall control and supersede any inconsistent and ambiguous provisions of the Trust Agreement.

Effective 2/24/88, the Trust Agreement is hereby amended as follows:

(1) Article I, Section 3—delete the phrase "... and the Trustees herein named shall continue to constitute the original Trustees hereunder."

(2) Article I, Section 6—delete and substitute the following:

The Trustees' names herein who are at the present time holding office as such Trustees for four-year terms respectively are the following: James M. Carlton, Everett L. Campbell, James A. Hood, Victor C. Olivadoti, John Pryshlak, Nicholas Robilotto, and Ervin Walker.

The term of office of each Trustee shall be four (4) years from his/her appointment or reappointment.

Trustees representing the employees shall automatically replace themselves at the end of their regular terms every four (4) years for a like term un-

less removed as required by law or by unanimous vote of the remaining existing employee Trustees.

Trustees representing employees shall cease to be Trustees in the event they cease to be either (1) an elected local union officer of a participating local union, or (2) a representative of such participating local union officially designated by such local union.

Trustees representing the employers shall automatically replace themselves at the end of their regular term every four (4) years unless removed as required by law, by a vote of two-thirds or more of the employers who contribute to the Fund, or by unanimous vote of the remaining existing employer Trustees.

Trustees representing the employers shall cease to be a Trustee in the event they cease to be either (1) an employee of a contributing employer to the Fund, or (2) an officially designated representative of such contributing employer(s) to the Fund.

In the event a vacancy exists, Trustees representing the employees shall be chosen in accordance with the following procedures:

(a) Any participating joint council shall nominate one or more candidates for the position of employee Trustee;

(b) Existing employee Trustees shall select successor employee Trustees from among the one or more candidates nominated by the said participating joint councils by a majority vote of all existing employee Trustees. In the event that a nominee does not receive a majority of the votes of all existing employee Trustees, the nominee shall be rejected;

(c) Individuals eligible to be nominated and/or selected for the position of employee Trustee must be either (1) an elected officer of a participating local

union, or (2) a representative of such participating local union officially designated by such local union;

(d) No local union shall have more than one Trustee on the Board of Trustees at any time.

In the event a vacancy exists, Trustees representing the employers shall be chosen in accordance with the following procedures:

(a) The employers who are contributing employers to the Fund shall nominate candidates for the position of employer Trustee;

(b) Existing employer Trustees shall select successor employer Trustees from among the one or more nominees chosen by the contributing employers by a majority vote of all existing employer Trustees. In the event that a nominee does not receive a majority of the votes of all existing employer Trustees, the nominee shall be rejected;

(c) Trustees representing employers shall cease to be Trustees in the event they cease to be either, (1) an employee of a contributing employer to the Fund, or (2) an officially designated representative of such contributing employer to the Fund.

Title to all Trust Property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

(3) Article II, Section 5—delete first sentence.

IN WITNESS WHEREOF, we the undersigned Trustees have executed this Agreement, subscribed our names as of this 24th day of February, 1988.

UNION TRUSTEES

EMPLOYER TRUSTEES

/s/ Nicholas Robilotto

/s/ John Pryshlak

/s/ Ervin M. Walker

/s/ James M. Carlton

/s/ Everett L. Campbell

APPENDIX E

STATUTORY APPENDIX

29 U.S.C. § 186. Restrictions on financial transactions

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * * *

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of

value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement

29 U.S.C. § 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2)
No. 90-288

Supreme Court, U.S.
FILED

SEP 17 1990

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18
and VICTOR C. OLIVADOTI,

Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND
HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK
STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL
FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL,
JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBI-
LOTTO, AND ERVIN WALKER,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

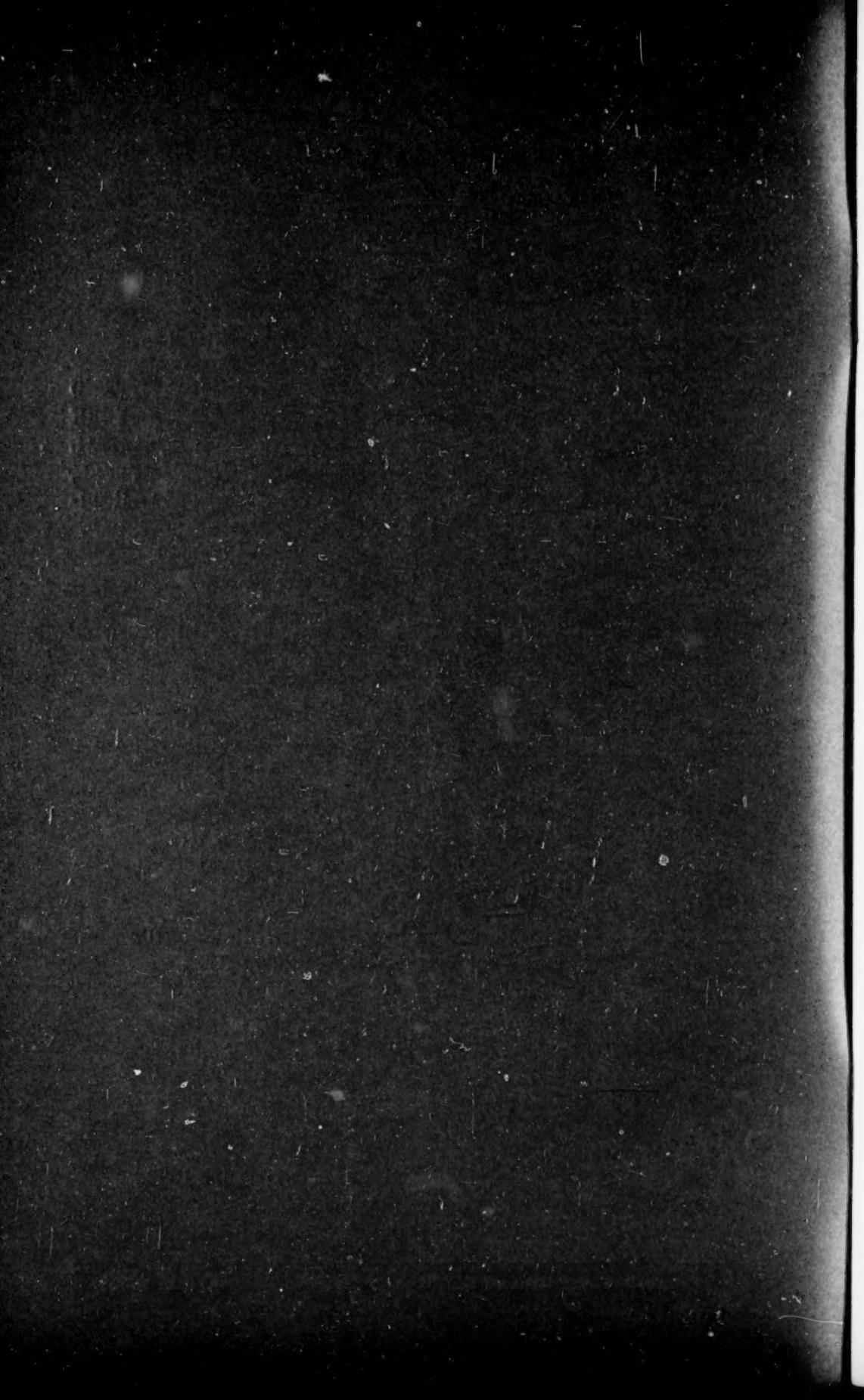
BRIEF IN OPPOSITION

JAMES J. KELLEY
(Counsel of Record)
THOMAS K. WOTRING
KEVIN L. WRIGHT
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

BERNARD T. KING
JULES L. SMITH
BLITMAN & KING
500 South Salina Street
Suite 1100
Syracuse, New York 13202
(315) 422-7111

Counsel for Respondents

BEST AVAILABLE COPY



QUESTIONS PRESENTED

1. Whether the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit erred in ruling that the February, 1988 amendment to the New York State Teamsters Council Health and Hospital Fund Trust Agreement did not contravene LMRA Section 302(c)(5), 29 U.S.C. § 186(c)(5).

2. Whether LMRA Section 302(c)(5) and ERISA Section 404(a), 29 U.S.C. § 404(a) allow the February, 1988 amendment to be evaluated against an arbitrary and capricious standard, or require that the Defendant Trustees' action be subjected to strict scrutiny.

PARTIES IN THE COURT OF APPEALS

The parties before the district court and the Second Circuit Court of Appeals were International Brotherhood of Teamsters Joint Council 18 and Victor C. Olivadoti, President of Joint Council 18 and Employee Trustee (Petitioners in this Court), and the New York State Teamsters Council Health and Hospital Fund, the Trustees of the New York State Teamsters Council Health and Hospital Fund, James M. Carlton, Everett L. Campbell, James A. Hood, John Pryshlak, Nicholas Robilotto, and Ervin Walker (Respondents in this Court). Although Petitioners now refer to Joint Council 18 as the "New York State Teamsters Joint Council 18," its denomination in the courts below was "International Brotherhood of Teamsters Joint Council 18."

TABLE OF CONTENTS

| | Page |
|--|------|
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 6 |
| I. THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE APPROPRIATE STANDARD OF REVIEW FOR TRUSTEE ACTIONS | 6 |
| II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE MAT- TER | 10 |
| III. THIS CASE IS NOT SUFFICIENTLY IM- PORTANT TO WARRANT REVIEW | 13 |
| CONCLUSION | 14 |
| APPENDIX | 1a |

TABLE OF AUTHORITIES

| Cases | Page |
|---|---------------|
| <i>Adams v. New Jersey Brewery Employees Pension Trust Fund</i> , 670 F.2d 387 (3rd Cir. 1982) | 7 |
| <i>Arroyo v. United States</i> , 359 U.S. 419 (1959) | 11 |
| <i>Associated Contractors v. Laborers International Union</i> , 559 F.2d 222 (3d Cir. 1977) | <i>passim</i> |
| <i>Bali v. Blue Cross and Blue Shield Association</i> , 873 F.2d 1043 (7th Cir. 1989) | 10 |
| <i>Boyd v. Trustees of United Mine Workers Health and Retirement Funds</i> , 873 F.2d 57 (4th Cir. 1989) | 10 |
| <i>Central Tool Co. v. International Association of Machinists National Pension Fund</i> , 811 F.2d 651 (D.C. Cir. 1987) | 8 |
| <i>Culinary and Service Employees Union Local 555 v. Hawaii Employee Benefits Administration, Inc.</i> , 688 F.2d 1228 (9th Cir. 1982) | 12 |
| <i>Deak et al. v. Masters, Mates and Pilots Pension Plan et al.</i> , 821 F.2d 572 (11th Cir. 1987), <i>cert. denied</i> , 484 U.S. 1005 (1988) | 8 |
| <i>Denver Metropolitan Association v. Journeymen Plumbers</i> , 586 F.2d 1367 (10th Cir. 1978) | 12 |
| <i>Donovan v. Bierwith</i> , 680 F.2d 263 (3d Cir. 1982), <i>cert. denied</i> , 459 U.S. 1069 (1982) | 8 |
| <i>Firestone Tire & Rubber Co. v. Bruch</i> , 109 S. Ct. 948 (1989) | 6, 9, 10 |
| <i>Guy v. Southeastern Iron Workers' Welfare Fund</i> , 877 F.2d 37 (11th Cir. 1989) | 10 |
| <i>Hurn v. Retirement Trust Fund of the Plumbing, Heating and Piping Industry</i> , 703 F.2d 386 (9th Cir. 1983) | 8 |
| <i>Independent Association of Mutuel Employees v. New York Racing Association, Inc.</i> , 398 F.2d 587 (2d Cir. 1968) | 12 |
| <i>International Brotherhood of Teamsters Local No. 169 v. Teamsters Health & Welfare Fund</i> , 327 F. Supp. 260 (E.D. Pa. 1971) | 12 |
| <i>Johnson v. Franco et al.</i> , 727 F.2d 442 (5th Cir. 1984) | 8 |
| <i>Knauss v. Gorman</i> , 583 F.2d 82 (3d Cir. 1978) | 7 |

TABLE OF AUTHORITIES—Continued

| | Page |
|---|------|
| <i>Lowry v. Bankers Life & Casualty Retirement Plan</i> , 871 F.2d 522 (5th Cir. 1989), cert. denied, 110 S.Ct. 1052 (1989) | 10 |
| <i>Mechanical Contractor Association v. Huico, Inc.</i> , 93 L.R.R.M. 2329 (W.D. Wash. 1976) | 12 |
| <i>Miles v. New York State Teamsters Conference Pension and Retirement Fund</i> , 698 F.2d 593 (2d Cir. 1983), cert. denied, 464 U.S. 829 (1983) | 6 |
| <i>Modern Woodcrafts, Inc. v. Hawley</i> , 534 F. Supp. 1000 (D. Conn. 1982) | 12 |
| <i>New Bedford Fishermen's Welfare Fund. v. S.I.U.</i> , 636 F. Supp. 412 (D. Mass. 1986) | 12 |
| <i>New York State Trucking Employers Association, Inc. v. DePerno</i> , C.A. No. 86-CV-234 (N.D. N.Y.) | 3 |
| <i>Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund</i> , 800 F.2d 742 (8th Cir. 1986) | 8 |
| <i>N.L.R.B. v. Amax Coal Co.</i> , 453 U.S. 322 (1981) .. | 12 |
| <i>Stinson et al. v. Ironworkers District Council Benefit Trust</i> , 869 F.2d 1014 (7th Cir. 1989) | 8 |
| <i>Struble v. New Jersey Brewery Employees Welfare Trust</i> , 732 F.2d 325 (3d Cir. 1984) | 8 |
| <i>Varhola et al. v. Doe et al.</i> , 820 F.2d 809 (6th Cir. 1987) | 8 |

Statutes

| | |
|---|---------------|
| Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 <i>et seq.</i> | <i>passim</i> |
| § 404(a) (1) (B), 29 U.S.C. § 1104(a) (1) (B) .. | 5, 10 |
| § 502(a) (1) (B), 29 U.S.C. § 1132(a) (1) (B) .. | 10 |
| Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-67, 171-87 | <i>passim</i> |
| § 302(c) (5), 29 U.S.C. § 186(c) (5) | <i>passim</i> |
| § 302(c) (5) (B), 29 U.S.C. § 186(c) (5) (B) | 11 |



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-288

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18
and VICTOR C. OLIVADOTI,
Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND
HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK
STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL
FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL,
JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBI-
LOTTO, AND ERVIN WALKER,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

Respondents New York State Teamsters Council Health
and Hospital Fund, the Trustees of the New York State
Teamsters Council Health and Hospital Fund, James M.
Carlton, Everett L. Campbell, James A. Hood, John
Pryshlak, Nicholas Robilotto, and Ervin Walker respect-

fully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 903 F.2d 919.

STATEMENT OF THE CASE

This case arises from a dispute over an amendment to the New York State Teamsters Council Health and Hospital Fund ("the Fund"). The Fund is a welfare benefit trust fund governed by Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. The Fund was founded in 1952 by the New York State Teamsters Council and by various contributing employers. It now provides benefits for employees who are members of eighteen local unions which are affiliated with three Joint Councils of the International Brotherhood of Teamsters (Joint Councils 17, 18, and 46). *Jt. App.* 35-36.¹

The Fund is governed by a written trust agreement. *App.* 1a-18a.² The Trust Agreement has been revised on numerous occasions and sets forth procedures for its amendment. *App.* 18a. Those procedures provide that the Trustees may amend the Trust Agreement "to any extent and at any time." *Id.*

The disputed amendment altered the appointment and removal procedures for Fund Trustees by placing appointment and removal authority in the participating joint councils and local unions. Prior to the February, 1988 amendment, the Agreement provided that Employee Trustees would be chosen by the "New York State Teamsters Council,"³ but that the entire Board of Trustees

¹ "Jt. App." indicates references to the Joint Appendix in the Court of Appeals proceedings below.

² "App." indicates references to the Appendix to this Brief in Opposition.

³ The "New York State Teamsters Council" no longer exists. Petitioners have maintained that IBT Joint Council 18 is the suc-

would designate which employer group would select the successor Employer Trustees.

For removal, the pre-amendment Agreement provided that Trustees could "only be removed from office for malfeasance or for any other reason specifically provided in the by-laws of the Board of Trustees." The Agreement also stated, with respect to removal, that a unanimous vote of the remaining trustees (Employer and Employee) was required. See App. 4a.

In 1986, the New York State Trucking Employers Association, Inc. and the Employer Trustees of the Fund sued the Union Trustees, challenging the Employee Trustees' involvement in the selection and removal of Employer Trustees. *New York State Trucking Employers Association, Inc. v. DePerno*, No. 86-CV-234 (N.D. N.Y.). On February 25, 1987, the parties entered into a Settlement Agreement, Jt. App. 165-70, under which they agreed that Trustees would not interfere with or become involved in the selection or removal of Trustees on the other slate. The court of appeals found that the amendment at issue here was adopted on February 24, 1988 to, among other things, conform the language of the Trust Agreement to the *DePerno* settlement. Pet. App. 8a⁴; Jt. App. 36-37.

For Employee Trustee appointment, the amendment specifies that successor Trustees will be selected by the current Employee Trustees from a list of nominees advanced by any one of the three participating Joint Councils. To qualify for nomination, a nominee must be

cessor to the "New York State Teamsters Council." Respondent does not accept that allegation but has conceded for purposes of the Motion for Summary Judgment that, prior to the 1988 amendment, Joint Council 18 had the exclusive authority to appoint and remove Employee Trustees. See App. Brief at 20 n.9 ("App. Brief" indicates references to Appellee's Brief in the Circuit Court below).

⁴ "Pet. App." indicates references to the Appendix to the Petition for a Writ of Certiorari, filed in this Court on August 15, 1990.

either an elected local union official or be specifically designated by a participating local union for Trustee service.

For Employer Trustee appointment, a similar process was established. The current Employer Trustees select successor Trustees from a list of nominees proposed by the contributing employers.

Under the amendment, neither slate of Trustees can participate in the selection of their counterparts on the other slate.

A parallel process was established for Trustee removal. Employee Trustees may be removed under the following conditions:

1. As required by law;
2. By a unanimous vote of the remaining Employee Trustees; or
3. By their local union affiliate.⁶

Employer Trustees may be removed:

1. As required by law;
2. By a unanimous vote of the remaining Employer Trustees; or
3. By a two-thirds vote of the contributing employers, or if removed by their affiliate employer.

See Pet. App. 23a-26a.

Petitioners commenced this action in January, 1989, seeking a declaratory judgment that the February, 1988 amendment constituted a "structural defect" to the Trust

⁶ To be eligible to serve as an Employee Trustee, the Trustee must be a local union officer or be designated for Trustee service by a local union. Local unions automatically remove Trustee representatives by voting them out of office or by revoking their Trustee service designation. See Pet. App. 23a-26a.

Agreement under LMRA Section 302(c) (5). The Complaint also sought a declaration that the Defendant Trustees' adoption of the amendment violated their fiduciary responsibility under ERISA Section 404(a) (1) (B).

Respondent Fund and Trustees Carlton, Campbell, Hood, Pryshlak, Robilotto and Walker filed an answer and counterclaim in due course. The counterclaim sought a declaration of the legality of the amendment and also requested reasonable attorney's fees and costs. Jt. App. 11.

Respondents filed a Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment. Jt. App. 25 *et seq.* The District Court granted that motion on May 31, 1989, and executed an Order so stating on that date. Pet. App. 16a. The court denied the request for reasonable attorneys' fees and costs. Pet. App. 14a, 16a.

Petitioners appealed the District Court's decision and Respondents cross appealed the denial of fees and costs. The United States Court of Appeals for the Second Circuit affirmed the conclusions of the district court, ruling that the February, 1988 amendment did not contravene LMRA Section 302(c) (5) in any respect. The Circuit Court also concluded that, under ERISA, the Trustees' conduct should not be disturbed absent a showing of bad faith or arbitrariness. The Court of Appeals remanded the fee issue to the district court for further consideration.⁹ Pet. App. 2a-10a.

⁹ The attorney fee question is pending before the district court at this time. However, briefing was delayed when Petitioner sought review in this Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR REVIEW OF TRUSTEE ACTIONS.

Federal courts have often addressed the appropriate standard for reviewing Trustee administration of LMRA trust funds. In recognition of the common law of trusts, courts have uniformly provided Trustees a range of discretion to administer such funds, subject to express terms of the trust document and the requirements of law. Where the trustees are given plenary authority by the trust agreement, their decisions should be overturned only if they are arbitrary and capricious. See *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 953-54 (1989) ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). Indeed, the LMRA's regulation of employee benefit funds is the source of the application of a deferential standard of review to trustee administration of those funds. *Id.* at 953.

Petitioners seek to establish a conflict between the circuits as to the governing standard for court review of trustee action. Specifically, they argue that *Associated Contractors v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977) requires "strict scrutiny" of any Trustee action which affects appointment and removal procedures for trustees, contrary to the circuit court below, which ruled that an "arbitrariness or bad faith" standard is appropriate, relying on *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983). See Pet. 15-17.⁷ Thus, Petitioners argue,

⁷ "Pet." indicates references to the Petition for a Writ of Certiorari filed in this matter on August 15, 1990.

the decision below has created a conflict in the circuits which public policy requires this Court to resolve.⁸

There is no such conflict. The United States Court of Appeals for the Third Circuit, *subsequent* to *Associated Contractors*, has made clear that an arbitrary and capricious standard of review for trustee conduct is appropriate in cases where trustee action has allegedly created a structural defect in the plan under LMRA Section 302(c)(5). *Adams v. New Jersey Brewery Employees Pension Trust Fund*, 670 F.2d 387, 397-98 (3d Cir. 1982); *Knauss v. Gorman*, 583 F.2d 82, 86-87 (3d Cir. 1978). Indeed, *Associated Contractors* does not address the appropriate standard for review of Trustee action and the term "strict scrutiny" does not appear in the *Associated Contractors* opinion. The court in *Associated Contractors* only notes that where the representation of Employers and Employees on a Fund is restructured by amendment, the amendment should be "carefully" scrutinized to assure that the resulting structure complies with the equal representation requirement. 559 F.2d at 227.

In this case, similarly, Petitioners alleged that the Trustees' amendment to the trust document created a structural defect under LMRA Section 302(c)(5) but the amendment at issue, unlike *Associated Contractors*, does not purport to "restructure" the representation of Employers and Employees on the Fund. The structure of the Board remained the same. By applying an arbi-

⁸ In *Associated Contractors*, the trustees of a Pension and Welfare Fund increased the size of the Board from six to eight trustees, and ceded to a rival association the right to appoint two of the four employer trustees. The court found that such a situation, where the two employer entities were avowed rivals and where Employee Trustees were importuned to support one of the rival groups, created an environment of intra-slate conflict which might upset the statutory "balance of power" (e.g., trustees representing one employer group might side with the Union to defeat the other employer group). 559 F.2d at 227-29.

bitrary and capricious standard to review the Trustees' action in this matter, the Second Circuit utilized the same standard of review as has the Third Circuit when reviewing other trustee conduct also alleged to have caused a structural defect in the Plan. In the process, the Second Circuit was faithful to *Associated Contractors* in "carefully" scrutinizing the resulting Trustee appointment/removal process to assure compliance with the intent of Section 302(c)(5). There is no conflict between these two circuits on the applicable standard of review.

In that regard, the Second Circuit is in accord with all other Circuits in applying the arbitrary and capricious standard of review to administrative actions affecting Section 302(c)(5) plans. *Stinson et al. v. Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1019 (7th Cir. 1989); *Deak et al. v. Masters, Mates and Pilots Pension Plan, et al.*, 821 F.2d 572, 576-77 (11th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *Varhola et al. v. Doe et al.*, 820 F.2d 809, 813 (6th Cir. 1987); *Central Tool Co. v. International Association of Machinists National Pension Fund*, 811 F.2d 651, 657-58 (D.C. Cir. 1987); *Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund*, 800 F.2d 742, 745 (8th Cir. 1986); *Johnson v. Franco et al.*, 727 F.2d 442, 447 (5th Cir. 1984); *Hurn v. Retirement Trust Fund of the Plumbing, Heating and Piping Industry*, 703 F.2d 386 (9th Cir. 1983).

Those cases which have applied heightened scrutiny to trustee conduct have done so only where trustees had clear conflicts between the interests of third parties outside the Plan and the interests of the Plan beneficiaries. See *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984); *Donovan v. Bierwith*, 680 F.2d 263, 271 (3d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).⁹ In this matter, the

⁹ Even in this respect there is no conflict between the Circuits. Both the Second and Third Circuits take the same approach to cases posing a clear potential for conflict.

Second Circuit confronted no such conflict to trigger heightened scrutiny. There is no allegation that the revised appointment and removal process compromised the interests of the Fund beneficiaries. In fact, Petitioners only argue that the amendment makes Employee Trustees less accountable to Joint Council 18, which allegedly sponsored their appointment. Both the District Court and the Court of Appeals, reviewing the text of the amendment, flatly rejected Petitioners' claim and concluded, that, on the contrary, the Trustees are now more easily removed than prior to the amendment.¹⁰ Pet. App. 7a. There are no special circumstances in this case warranting a higher standard of review. Thus, the Court of Appeals properly reviewed the subject Trustee action under the arbitrary and capricious standard.

This Court's decision in *Firestone* does not require a higher standard for review of this type of Trustee action under ERISA. This Court's rejection of the "arbitrary and capricious" standard of review for trustee actions denying or granting benefits was based on the inapplicability of that trust law standard to ERISA's statutory remedy. 109 S.Ct. at 954. This Court therefore held that the arbitrary and capricious standard would apply only if Trustees were granted the necessary discretion by the Trust Agreement. *Id.* Article II, Section 1(m) of the Trust Agreement gives the Trustees plenary authority to construe the provisions of the Trust, and provides that any construction adopted by the Trustees will be binding upon the employers, employees, and the unions which

¹⁰ Petitioners allegation that the amendment was adopted to protect Trustee Robilotto has no admissible support in the record. More importantly, Petitioners overlook that Trustee Robilotto was appointed by Joint Council 18 and could have been removed by Joint Council 18 at any time prior to the amendment. The argument that the amendment was adopted to protect Robilotto from removal is untenable. Robilotto may now be removed by the remaining Employee Trustees, by the local union which designated him for service, or as required by law, if his prior legal difficulties (Pet. at 4) compromised his eligibility to serve.

are or shall be party to the Agreement. App. 9a. Furthermore, Article IV, Section 1 gives the Trustees the authority to amend the Trust Agreement "to any extent and at any time." App. 18a. Although this is not a benefits determination case under 29 U.S.C. § 1132(a)(1)(B), *Firestone's* guidance suggests that a deferential standard of review in this case is appropriate. 109 S.Ct. 953-54. See *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989); *Boyd v. Trustees of United Mine Workers Health and Retirement Fund*, 873 F.2d 57, 59 (4th Cir. 1989); *Bali v. Blue Cross and Blue Shield Ass'n.*, 873 F.2d 1043, 1047 (7th Cir. 1989); *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-25 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 152 (1989).

Moreover, the sole basis for Petitioners' allegation that adoption of the disputed amendment violated ERISA was that the amendment contravened LMRA Section 302(c)(5). The standard for review of trustee action under the LMRA is "arbitrary and capricious." 109 S.Ct. at 953. Since the ERISA claim here derives from an alleged LMRA violation, the arbitrary and capricious standard as established under the LMRA should apply.

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE MATTER.

This case presents a simple, straight-forward issue: does the February, 1988 amendment to the trust agreement contravene LMRA Section 302(c)(5) and ERISA Section 404(a)(1)(B). The court below evaluated the amendment against the dictates of the relevant statutes and properly concluded the amendment was permissible.

Petitioner's principal allegation throughout this litigation has been that the amendment removes Trustee accountability by insulating them from removal. See, e.g., Pet. at 13-15. The amendment does not have this effect. Prior to the amendment, Employee Trustees could be removed only by either the "New York State Team-

sters Council" or by a unanimous vote of the remaining Trustees (Employer and Employee) for undefined "malfeasance" or "for any other reason provided in the bylaws of the Board of Trustees." After the amendment, Employer Trustees are now removable either by a unanimous vote of the remaining Employee Trustees, by the local union with which they are affiliated, or as required by law. See Pet. App. 23a-25a. The amendment places no limits on the reasons for removal. The courts below properly concluded that Trustees are more easily removed now than prior to the amendment, and they are not insulated from accountability.

Petitioner's real complaint is not advanced on behalf of the Fund beneficiaries, but is motivated by political concerns: the February, 1988 amendment removed Joint Council 18's dominant control over the appointment and removal process for Employee Trustees, and the corresponding ability to control the Employee Trustees engendered by such unlimited power. There is no dispute that the amendment prevents Joint Council 18 from appointing or removing a Trustee on its own initiative. That authority now rests with all three participating joint councils, the local unions with whom the employee trustees are affiliated, and with their Co-Trustees. A Trustee that was appointed by Joint Council 18 is no longer removable solely by Joint Council 18, but he is removable by the local union of which he is an officer or official designate or by his Co-Trustees.

The simple fact that Joint Council 18 does not have exclusive and unfettered authority to remove trustees which it may have appointed does not violate LMRA Section 302(c)(5). No participating employer or union entity has the right to individually designate the trustees administering LMRA funds. Section 302(c)(5) requires only that the interests of employers and employees be equally represented in the administration of trust funds. 29 U.S.C. § 186(c)(5)(B); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). It does not require that

every participating entity have direct representation on the board of trustees of a benefit fund or that any participating union or any contributing employer have the right to control trustee appointment and removal. *Culinary and Service Employees Union Local 555 v. Hawaii Employee Benefit Administration, Inc.*, 688 F.2d 1228 (9th Cir. 1982); *Denver Metropolitan Association v. Journeymen Plumbers*, 586 F.2d 1367, 1374 (10th Cir. 1978); *Associated Contractors*, 559 F.2d at 227; *Independent Association of Mutuel Employees v. New York Racing Assoc., Inc.*, 398 F.2d 587, 590-91 (2d Cir. 1968); *New Bedford Fishermen's Welfare Fund v. S.I.U.*, 636 F. Supp. 412, 414-15 (D. Mass. 1986); *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000, 1008 (D. Conn. 1982); *Mechanical Contractor Association v. Huico, Inc.*, 93 L.R.R.M. 2329, 2332 (W.D. Wash. 1976); *IBT Local 169 v. Teamsters Health & Welfare Fund*, 327 F. Supp. 260, 263 (E.D. Pa. 1971). The courts below followed this well-established line of authority in holding that Section 302(c)(5) does not accord Joint Council 18, as a participating employee entity, the inalienable right to trustee appointment and removal authority.¹¹

The disengagement from Joint Council 18 of exclusive control over trustee appointment and removal does not constitute illegal insulation from accountability. Nothing in the equal representation requirements of LMRA Section 302(c)(5) requires that trustees answer to the employee or employer entity which appointed them—the result sought by Petitioners throughout this litigation. As this Court made clear in *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 (1981), a trustee's loyalty rests with the beneficiaries of the Fund, not with any particular appointing

¹¹ Petitioner's reliance on *Associated Contractors* is again ill-advised. *Associated Contractors* expressly recognizes that "not every party . . . to a welfare and pension fund has a right to select the fund's trustees." 559 F.2d at 227; *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000, 1011-12 (D. Conn. 1982).

entity. By removing exclusive control over appointment and removal from Joint Council 18 and by placing it with the participating Joint Councils and local unions, the amendment allocated appointment and removal authority more broadly to those to whom this Court has determined the Trustee's true loyalty belongs.

The amendment offends neither trustee accountability nor equal representation, and the courts below properly found it permissible.¹²

III. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW.

This Court exercises its certiorari jurisdiction "only when there are special and important reasons" to do so. Sup. Ct. R. 10.1. Both the District Court and the Court of Appeals below readily found that the disputed amendment preserved trustee accountability, was properly adopted in accordance with the Trust Agreement which gives the Trustees the authority to amend the document "to any extent and at any time," Jt. App. at 58-59, and did not offend the statutory requirement of equal representation in any respect. The simple fact that there are many employee benefit plans in the United States, which contain large amounts of assets, does not make this dispute over the amendment to a single plan worthy of review in this Court.

The case presents no novel legal issue for examination by this Court, nor has Petitioner advanced any compelling public policy basis for granting certiorari in this matter. Rather, this is a case about a single amendment

¹² There is absolutely no support for Petitioners' suggestion that a "sponsoring labor organization" has the right to influence trustee appointment and removal, *vis a vis* other participating labor organizations. As already noted, however, there is well-established authority that no individual employee or employer entity can claim the individual right to appoint or remove trustees under LMRA Section 302(c)(5).

to a single trust agreement to ensure compliance with governing statutes, and a disgruntled union strongman's attempt to overturn it. This case therefore presents no "special and important" issues justifying Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

JAMES J. KELLEY
(Counsel of Record)
THOMAS K. WOTRING
KEVIN L. WRIGHT
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

BERNARD T. KING
JULES L. SMITH
BLITMAN & KING
500 South Salina Street
Suite 1100
Syracuse, New York 13202
(315) 422-7111

Counsel for Respondents

September 17, 1990

APPENDIX

APPENDIX

TRUST AGREEMENT

**NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND**

Preamble

WHEREAS, a trust agreement was made and entered into on the 9th day of June 1952 by and between the New York State Teamsters Council, a voluntary unincorporated association, hereinafter referred to as the "Council" and various Employers in the State of New York who now are, then were, or will hereinafter become parties to collective bargaining agreements with the said Council or participating local Unions and who then had, now have, or will hereinafter agree to be bound by this Trust Agreement, hereinafter called "Employers", and

WHEREAS, the New York State Teamsters Council Fund was established pursuant to such original Trust Agreement of June 9th, 1952, and has continued in operation from that time to the present; and

WHEREAS, it appears advantageous to codify all previous changes and Amendments into one Instrument as amended; and

WHEREAS, the undersigned constitute the signatories to such original Trust Agreement and its Amendments from time to time, and all the remaining Trustees or their successors under the terms of such Trust Agreement, it is agreed in consideration of the premises and of the mutual promises and covenants made by each of the parties in the original agreement and hereto each to the other, as follows:

ARTICLE I

Organization

Section 1. There is hereby created and continued in existence the "NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND".

Section 2. The purposes of said trust fund shall be to promote, develop and administer a program which shall provide for the payment under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion, of welfare benefits for the employees of contributing employers under the terms of a collective bargaining agreement or agreements between such contributing employers and the New York State Teamsters Council and/or local unions affiliated or participating with the said New York State Teamsters Council including death benefits, health and accident coverage, hospitalization, surgical benefits and proper medical and dental care. Any part or all of the above welfare benefits, with the exception of death benefits, may be extended to the dependents of such employees, under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion. Any local union may be considered as a contributing employer for its employees, and officers and business agents. Also considered as employers for their employees shall be the New York State Teamsters Council Health and Hospital Fund and the New York State Teamsters Conference Pension and Retirement Fund.

Section 3. The said trust fund shall be administered by a Board of Trustees, hereinafter designated as the "Trustees". There shall be equal representation of employees and employers in the administration of such Trust Fund. The trustees hereunder shall be eight (8) in number unless and until a different number shall be fixed by the Trustees as hereinafter provided, and thereafter shall be such number as shall be fixed from time to time by the Trustees; and the Trustees herein named shall continue to constitute the original Trustees hereunder.

Section 4. That, notwithstanding the said name and designation of "New York State Teamsters Council Health and Hospital Fund" title to the entire Trust Es-

tate or Fund and the absolute control thereof shall, at all times, be vested in the Trustees; and all obligations incurred, by, or in behalf of, the Trustees, shall be obligations of the trustees only, and not of the members of the Union or Unions nor of the International Union to which said Union or Unions is affiliated nor of the New York State Teamsters Council as such, but enforceable only against the Trustees, and then only to the extent of the Trust Estate in their hands and possession and never against them or any of them in their individual capacity or capacities; nor shall such obligations be considered obligations of the Employers either collectively or individually.

Section 5. The original trustees under this Amended Trust Agreement shall be Rocco F. DePerno, Fred Maggio, Nicholas Robilotto, and Donald Wells, who are representative of and chosen by the New York State Teamsters Council and Thomas R. Blando, Raymond Ryan, Gordon R. Tooley and Henry J. Tuffley, who are representatives of and chosen by the contributing Employers herein.

Section 6. The eight (8) Trustees names herein and who are at the present time holding office as such Trustees for four year terms respectively, are the following:

Donald Wells and William H. Mosley, Sr. to June 30th, 1977;

Rocco F. DePerno and Thomas R. Blando to June 30th, 1980;

Paul Gambacorto and David Quidort to June 30th, 1979; and

Johiah M. Wills and Nicholas Robilotto to June 30th, 1978

and they shall continue to hold office as Trustees to the end of such term. The term of office of each successor trustee shall be four (4) years. Successor trustees representing the employees shall be chosen in accordance

with the rules and regulations of the New York State Teamsters Council and shall automatically replace themselves at the end of their regular terms ever four (4) years for a like term unless removed by the said New York State Teamsters Council. The Board of Trustees as a whole shall determine from time to time what employer group or groups shall elect successor employer trustees or fill vacancies in employer trustees, whether caused by death or otherwise. Such group or groups must, however, consist only of contributing employers to the Trust Fund, and no employer who is not a contributor to the said Trust Fund may vote for such employer trustees. The employer trustees shall automatically replace themselves at the end of their regular term every four (4) years unless removed by the employer group or groups designated by the Board of Trustees as provided herein.

Trustees can only be removed from office for malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees, and the Board as a whole is the sole judge of the qualifications of each Trustee. Title to all Trust property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision, without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

Section 7. The Trustees established under this Trust Indenture shall serve as the named fiduciaries as required by the Employee Retirement Security Act of 1974 (hereinafter referred to as "ERISA"). The Trustees

shall have the authority to manage and control the administration and operation of the Fund and Plan.

Section 8. The principal office of the New York State Teamsters Council Health and Hospital Fund shall be located at such places as the Trustees shall designate from time to time.

ARTICLE II

Powers and Duties of the Board of Trustees

Section 1. That, until the termination of the Trust hereby created, the Trustees in the control and management of the Trust estate and in the conduct of the business of the Trust shall have power at any time, and from time to time, to invest and re-invest the Trust Estate at their absolute discretion, and without limiting the generality of the foregoing shall have power, at any time, and from time to time, to do the following:

(a) To subscribe for, invest in, and acquire such bonds, options, or other securities as the Trustees may, in their own uncontrolled discretion, determine, and to hold, sell, exchange, pledge, or otherwise dispose of such bonds, options, or other securities, which shall not be limited to those designated as "legals".

(b) To borrow money, without or with security, on such terms as the Trustees, in their uncontrolled discretion, may deem desirable, and to issue notes, bonds or other obligations therefore that may mature at a time beyond the possible termination of the Trust or any earlier time, and to enter into and make any indentures of trust or other agreements, covenants or arrangements for the benefit or security of such obligations.

(c) The Trustees shall have the power to demand, collect, receive and receipt for employer contributions or payments and other funds coming due as part of the Trust Estate, and may take such steps including the institution and prosecution of, or the intervention in any

proceeding at law, or in equity, or in bankruptcy, as may be necessary or desirable to effectuate the collection of such employer contributions or payments and other funds to which said Trustees shall be entitled. To consent to the extension of the time for payment or to the renewal of any bonds or other securities or obligations belonging to the Trust Estate, and to prosecute, defend, compound, compromise, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, demands, and things relating to the Trust Estate, and to transfer to any deposit with any corporation, committee, or other persons, any stocks, shares, bonds, or other securities forming part of the trust estate for the purpose of any arrangement for enforcing or protecting the interests of the trustees, and to pay any assessment levied in connection with such arrangement.

(d) To deposit any moneys included in or derived from the Trust Estate in such bank or banks as the Trustees may select for that purpose, to entrust to said bank or banks for safekeeping any of the funds, stock or share of certificates, bonds or other securities or obligations and any documents and papers comprised in, or relating to the Trust estate. The Resolution required to be executed for the purpose of opening said bank account shall provide for the signing of all checks in said account, by one Trustee representing the employees and one Trustee representing the employers.

(e) The Trustees shall also be empowered to appoint one or more banks or trust companies as Corporate Trustee or one or more investment managers (as defined in Section 3 (38) of ERISA), who shall be responsible for the management, acquisitions, disposition, investing and reinvesting of such of the assets of the Trust Fund as the Trustees may specify. If a corporate Trustee or investment manager has been appointed by the Trustees, no Trustee shall be liable for the acts or omissions of such Corporate Trustee or investment manager or be

under any obligation to invest or otherwise manage any asset of the Plan which is subject to the management of such Corporate Trustee or investment manager.

(f) To sell and convey as an entirety all of the property and assets of this Trust to a corporation or a new association or trust, organized for the purpose of acquiring the same, and organized for the same purposes and objects as in this Trust, provided that the consideration for such sale and conveyance shall be the assumption by such new corporation or association or trust of all liabilities and obligations of this Trust then outstanding, and the issuance and delivery by such new corporation or association or trust to this Trust, or upon its order, for distribution, as hereinafter provided, for all such shares as will enable this Trust to carry out its objects equitably and to obtain the greatest possible protection for the Union members employed by the participating employers.

(g) To provide for the payment of the welfare benefits to the members and their dependents under the plan of benefits provided directly by the check or draft of the Fund under self-insurance, or, if such self-insurance does not prove sound or feasible, to enter into contracts for the purchase of insurance for any or all of the coverages provided for in the plan of benefits from an insurance or casualty company, to pay the premium for such insurance, to determine the type and amount of insurance and to change such contracts and agreements from time to time; to enter into contracts for the purchase of hospitalization protection for the members of the Union and their dependents and to change the amounts of such protection from time to time; to enter into contracts with a doctor or doctors, and/or dentist or dentists, and/or optician or opticians, to provide medical, dental or optical care for the members of the Union and/or their dependents, and to change such contracts

from time to time; to pay the premiums and fees necessary to carry out such contracts and to maintain such insurance and other benefits in operation to such extent as the Trustees in their own discretion deem advisable, provided that these shall not be less than what is required under the labor contract or contracts hereinbefore mentioned.

(h) To make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this Agreement and Declaration of Trust as they may deem necessary or desirable for the conduct of their business and the government of themselves, their officers, agents and other representatives.

(i) To determine, from time to time, whether and to what extent, and at what times and places, and under what conditions and regulations, the acts and books of the Trustees, or any of them, shall be open for inspection, except as required by law or government regulation, and no employer or members of the Union shall have the right to inspect any act or book or document of the Trustees except as authorized by resolution of the Trustees, or except in accordance with such conditions and regulations, if any, as may be prescribed at any time, by the Trustees or as required by law or government regulation; to issue such financial statements as they may deem proper and to determine at what time such statements shall issue, and the method of distribution unless otherwise required by law or government regulation. Provided, however, that the Trust Fund shall be audited annually by a Certified Public Accountant under the supervision of the Secretary-Treasurer of the Fund, and the result of such audit shall be available for inspection by any interested person at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

(j) To perform and do all such further acts and things as may be properly incidental to the exercise of the foregoing powers, or any agreement, to the same extent to which such further acts and things might be performed and done by a corporation lawfully organized and existing for the purposes and with the powers set forth in this Declaration.

(k) To appoint and designate a lawyer or lawyers to act as counsel to the New York State Teamsters Council Health and Hospital Fund in the handling of its legal affairs.

(l) The Trustees shall establish a funding policy and method consistent with the objectives of the Plan and the requirements of Part 3 Title I of ERISA. The Trustees shall meet annually at a stated time of the year to review the funding policy and method and the results shall be recorded in the minutes of the Trustees meeting.

(m) The Trustes shall have power to construe the provisions of This Declaration of Trust and the terms used herein. Any construction adopted by the Trustees in good faith shall be binding upon the employers, employers association or associations, the employee, the Council, the Union or Unions which are, or shall be parties to this Declaration of Trust.

Section 2. The regular meetings of the Trustees shall be held at Utica, New York, or such places, and at such times as the Trustees, by vote from time to time, may determine; and if so determined, no notice thereof need be given.

Section 3. Meetings other than regular meetings of the Trustees may be held at any time and at any place when called by four (4) or more Trustees. Notice of such meeting shall be given by the person designated by the Trustees or by the persons by whom such meeting is called, by giving to each of the Trustees three (3) day's notice of such meeting, sent by mail, postage pre-

paid or by telegram to the Trustees' usual address. It shall not be necessary to give notice of any meeting, as aforesaid, to any Trustee who is present at such meeting, or who, either before or after the meeting, waives such notice either orally or in writing.

Section 4. That in order to constitute a quorum for the transaction of any business, there must be present three (3) Trustees representing the contributing employers and three (3) Trustees representing the New York State Teamsters Council at any meeting or adjourned meeting.

Section 5. When a quorum is present, as above defined, a unanimous vote of the remaining Trustee shall be necessary for the removal of a Trustee as provided in Article I, Section 6 of this Trust Agreement. On all other questions, no proposition, resolution or motion shall be considered carried unless an affirmative vote is cast by two-thirds of the Trustees present at such meeting. In the event that two-thirds consist of a whole number and a fraction, then a two-thirds vote shall be deemed to consist of the next highest whole number.

Section 6. The Employer Trustees and the Council Trustees shall each elect by a majority vote, a Chairman. The Chairman so elected shall alternate monthly in serving as Chairman of the Board of Trustees.

Section 7.

(a) The Trustees shall be empowered to authorize any person or group of persons to serve in more than one fiduciary capacity (including service both as a Trustee and Administrator).

(b) The Trustees are empowered to authorize specifically by a resolution in writing the allocation of their collective responsibilities for the operation and administration of the Plan to one or more Committees of Trustees upon the condition that every committee have an equal number of Employer designated Trustees and

Union designated Trustees and that the resolution creating such committee specify its power and purposes. Where Trustees have allocated specific responsibilities, obligations or duties among Trustees, a Trustee to whom certain responsibilities, obligations or duties have not been allocated shall not be liable either individually or as a Trustee for any loss resulting to the Plan arising from the acts or omissions on the part of another Trustee to whom such responsibilities, obligations or duties have been allocated.

(c) The Trustees are empowered to authorize specifically by a resolution in writing the allocation of fiduciary responsibilities, other than Trustee responsibilities, among named fiduciaries and for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than Trustee responsibilities under the Plan). Where pursuant to the above procedure any fiduciary responsibilities of a named fiduciary is allocated to any other person, or persons designated to carry out such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent specified in Section 405 (c) (2) (A) and (B) of ERISA.

(d) Any provision of the Trust Indenture or the Plan which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty as required by ERISA shall be void as against public policy.

Section 8. The Trustees shall designate an Administrator and/or Consultant to the Fund and such other employees as the Trustees may deem proper, and may permit any such employee or employees to resign, and may remove any such employee with or without cause, and without notice of any kind, and may fill any vacancy and may select temporary employees to serve at the pleasure of the Trustees. Such administrator and/or consultant and other employees shall be governed and

bound by all rules, regulations and provisions that may be established or adopted by the Trustees, and as may be changed from time to time. The said Board shall have power to determine the compensation of such administrator and/or consultant and other employees and for such purpose to enter into contracts of employment.

Section 9. That the Trustees shall jointly have custody of all moneys belonging to the Trust Estate and shall deposit and invest the same as aforesaid, and shall disburse the same in the discharge of obligations incurred by the Trustees for the purposes authorized by the Trustees, and for no other reason, by checks drawn by them against any deposit account or accounts and signed on behalf of the New York State Teamsters Council Health and Hospital Fund, as such Trustees, as hereinabove provided. The Trustees shall authorize a Trustee or an employee to keep accurate books of account of the financial transactions of the Trustees and shall require a bond for the faithful performance and discharge of the duties of such employee. Each Trustee and each employee of the Fund authorized or empowered to handle the funds or property of the Trust Estate, or to deposit or withdraw the same, or to sign or countersign checks drawn against said Trust Estate shall be bonded in an amount to be determined by the Board of Trustees from time to time for the faithful discharge of their duties. The premium on such bond or bonds shall be paid out of the Trust Estate, and such bond or bonds, if given, shall be in the custody of the Trustees or their attorneys.

Section 10. That in this Declaration of Trust nothing shall be deemed or construed to constitute the Trustees and/or the members of the Union and/or the employers paying into the Trust, as aforesaid partners; and it is further expressly declared that a trust and not a partnership is hereby created by this Declaration of Trust. It shall be the duty of the Trustees, and each of them to include in every written agreement entered into by them, or any of them as herein provided, and of every

officer or agent elected or appointed by the Trustees to include in every written agreement entered into, a statement of immunity provided by this Declaration for the Trustees, officers, agents and other representatives of this Trust as individuals; and neither the Trustees nor any officer, agent or representative appointed or elected by them shall have any power or authority to enter into any agreement or incur any obligation as herein provided which shall in any way bind any of the Trustees individually or the Union or the individual employers, but their power shall be limited to obligations and agreements binding upon the Trust Estate.

Section 11. Unless sooner terminated, the Trust hereby created shall continue indefinitely, provided, however, that pursuant to agreement between the New York State Teamsters Council and seventy-five (75) percent of the contributing employers jointly, upon six (6) months' notice to terminate the fund, the Trust hereinabove set forth shall be deemed terminated at the expiration of such period, and all funds, securities, goods, valuables and property in the possession of the Trustees and held or owned by them under this Declaration shall be liquidated and the proceeds used until exhausted to provide benefits under the welfare plan. In the event of such termination, it shall be the duty and obligation of the Trustees, and each of them, and of their heirs, executors, assigns and legal representatives, to execute such documents, deeds, assignments or other indicia of title as may be necessary and proper to effectuate this transfer and termination.

Section 12.

(a) The Trustees and each individual Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of the Trust unless they have failed to exercise the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct

of an enterprise of a like character and with like aims, nor shall any Trustee be personally liable for the acts or omissions (whether performed at the request of the Trustees or not) of any other Trustee, or of any agent or person or entity elected or appointed by or acting on behalf of the Trustees unless he participates knowingly in, or knowingly undertakes to conceal an act or omission of such agent or person or entity, knowing such act or omission is a breach of fiduciary responsibility, or he has enabled such agent or person or entity to commit a breach of fiduciary responsibility by his failure to comply with his own specific responsibilities, or he has knowledge of a breach of fiduciary responsibility by such agent, or person, or entity and has not made reasonable efforts under the circumstances to remedy such breach.

(b) The Trustees may purchase out of Fund assets insurance for the Trustees or the Fund to cover liability or losses occurring by reason of the act or omission of the Trustees if such insurance permits recourse by the insurer against the Trustees in the case of a breach of a fiduciary obligation by the Trustees. The Employers and the Union may purchase insurance to cover the potential liability of their designated Trustees. A Trustee may also purchase insurance for himself to cover liability or loss occurring by reason of the act or omission of said Trustee or by reason of the breach of their fiduciary responsibility.

In the event that in any action against the Trustees individually or collectively an attachment, lien or other encumbrance of any kind is or may be placed or taken against the personal estate or property of any trustee or trustees, the cost of any bond or surety necessary to protect or release the personal property of the trustee or trustees, until such time as a final judgment be entered against such trustee or trustees shall be borne by the fund.

Section 13. The death of any Trustee shall not operate to terminate the Trust nor shall the legal representative

of such Trustee be entitled to any accounting or to take any action in the courts or otherwise, but the election of such Trustee shall be deemed purely personal and not a right that can descend to heirs at law or legal representatives.

Section 14. In the event that the employer trustees and the employee trustees deadlock on the administration of the Trust Fund created by this Trust Agreement, the matter in dispute shall be submitted to an impartial Chairman for final determination, and his decision in regard to the matter in dispute shall be binding upon all of the Trustees and deemed to be their act and decision. The decision of such Impartial Chairman shall be in writing and shall be enforceable as an arbitration award in any court of competent jurisdiction. However, neither the Trustees nor the impartial Chairman shall have the power in any way whatsoever to alter, diminish or add to the basic provisions regarding said Trust Fund, its management and its use. The cost and expense of maintaining the office of impartial Chairman, in connection with the administration and management of the said Fund shall be borne by the Fund.

Section 15. In the event that the Trustees are unable within thirty (30) days after a disagreement to agree upon an impartial Chairman as provided in section 14 above, a majority of the Union Trustees or a majority of the employer Trustees may petition the District Court of the United States for the district where the Trust Fund has its principal office, to appoint an impartial Umpire. The decision of such impartial Umpire shall be final and binding.

Section 16. No employee, nor any person claiming by, through or under any employee, nor any employer (except as to an overpayment of contributions) shall have any right, title or interest in or to the Trust Estate or any part thereof; provided, however, that any employee who shall be actually covered by an insurance

plan, or his beneficiaries under such plan, shall be entitled to the benefits in the forms and amounts and subject to the terms and conditions of such plan and of this Trust. No employee shall have the option to receive any part of the employer contribution instead of the benefits of such plan or of this Trust. No employee shall have the right to assign his right and benefits under such plan or of this Trust or to receive a cash consideration in lieu of such benefits either upon the termination of the Trust or his withdrawal through severance of employment or otherwise.

Section 17. The Trustees may receive compensation for the performance of their duties as Trustees to the extent permitted by law and in such amounts as the Board of Trustees may determine including reimbursements of all reasonable and necessary expenses which they incur in the performance of their duties as Trustees. The cost and expense of any suit or proceeding brought against the Trustees or any of them (including counsel fee) shall be paid from the Trust Estate.

If any Trustee shall be called upon to travel or perform extra services he shall be paid his expenses and such special remuneration as the Trustees reasonably may determine. No Trustee shall be obliged to give any bond or surety or other security for the performance of any of his duties hereunder except as provided in section 9 of this Article.

ARTICLE III

Miscellaneous

Section 1. The Trustees shall require that the signing of checks, drafts, vouchers or other withdrawals of funds from the account or accounts of the Trust Estate as they may deem necessary or advisable for the proper administration of the Trust be made by any two Trustees so designated by the Board of Trustees provided one is a

Union designate Trustee and the other an Employer designated Trustee.

Section 2. The Trustees shall have the power to require any employer, and any employer when so required, shall furnish to the Trustees, such information and reports as they may require in the performance of their duties under this Agreement and Declaration of Trust. The Trustees, or any authorized agent or representative of the Trustees, shall have the right at all reasonable times during business hours to enter upon the premises of employers and to examine and copy such of the books, records, papers and reports of said employers as may be necessary to permit the Trustees to determine whether said employers are making full reports and payments to the Trustees of the amounts required by the aforementioned collective bargaining agreement.

Section 3. Should any provisions of this Trust be deemed or held to be unlawful or unlawful as to any person or instance, such fact shall not adversely affect the other provisions herein contained or the application of said provisions to any other person or instance, unless such illegality shall make impossible or impractical the functioning of the ultimate plan. No Trustee shall be held liable for any act done or performed in pursuance of any provision herein (regardless of the fact that such provision or act may be held unlawful) prior to the time when such provision or act shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 4. Should any provisions of the aforementioned collective bargaining agreement between the New York State Teamsters Council and/or its affiliated local unions and the New York State Employers Association, Inc. and/or its members or any individual employer contributing to this Fund be declared to be in violation of the Labor-Management Relations Act of 1947, as amended (commonly called the "Taft-Hartley Act") or any other State or Federal statute or regulation, such

declaration shall in no way impair the effectiveness or continuity of the provisions of such contract or contracts or of this Declaration of Trust which establish the Health and Hospital Fund and provide for the payment of contributions by the employers to such Fund, and such provisions are hereby declared to be saved from such illegality.

Section 5. The Trustees, by joining in the execution of this Agreement hereby accept the Trust.

ARTICLE IV

Amendment

Section 1. This Agreement and Declaration of Trust may be amended to any extent and at any time and from time to time or revoked, at a regular or special meeting of the Trustees called for that purpose by the concurring vote of at least two-thirds of the Trustees provided, however, that no amendment or revocation shall provide for the use of the Trust Estate then in the hands of the Trustees for any purposes other than that set forth in Article I, Section 2 of this Trust Agreement or permit any return or payment over of any part of the then existing Trust Estate to any employers, except the return of an overpayment of contributions due, or so amend this Trust Agreement that there shall not be an equal number of employer Trustees and of Union Trustees to administer this Trust.

* * * *

